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THE CASE OF THOMAS SIMS.

We should have preferred, had our limits permitted, to give a full report of all the proceedings in the case of Sims, which, from its nature, from the peculiar circumstances attending it, and from the grave and important questions involved, excited a deep and general interest. The acuteness, vigor, and ability of the arguments of counsel, and of the elaborate opinion of the Commissioner, would attract both general and professional readers. But the arguments and the opinion were of such length, that, if given in full, they would fill two or three numbers of the Reporter. It is therefore a matter of necessity to give a history, rather than a report of the case; to state the facts and the legal points made and decided, and not to follow out in detail each illustration and incident of the hearing.

Sims is a mulatto, about twenty-two years of age, the slave of James Potter, a rice planter, in Chatham county, Georgia. He is a bricklayer by trade, and was permitted to live in the city of Savannah with his mother and the rest of her family, and work at his trade. He escaped from Savannah in the brig M. & J. C. Gilmore, which sailed from that city for Boston on the night of the twenty-first of February last. The officers of the brig did not discover that he was on board until they had come to anchor inside of Boston light on the night of the sixth of March, when he was by chance found in one of the berths in the forecastle. He was at once confined, but soon escaped by unscrewing the lock on the door of the state-room, and,

taking the boat of the vessel, landed in South Boston. In a subsequent conversation with the officers of the brig upon one of the wharves in Boston, he stated that he was a free man, a native of Florida, where his father had purchased his freedom, and that his free papers were in the hands of Morris Potter, of Savannah; that some one had threatened to inform against him as being in the State of Georgia, contrary to law, in which case he must have paid the pecuniary penalty to which free blacks coming into, or remaining in that State, are exposed, or, in default thereof, been sold as a slave; that being without money to pay either the penalty or passage money, he smuggled himself aboard the brig, and that he took a vessel bound to Boston, because he had a mother and sister there.

On the ninth of March, he took lodgings at No. 152 Ann street, in Boston, and on the following day sent, by telegraph, to a free colored woman in Savannah, who was, as he said, his wife, informing her of his residence, and requesting of her money, as he was destitute. This information was at once given to his master, Mr. James Potter, who on the twenty-seventh of March executed in Savannah the proper legal documents for the recovery of Sims. On the third of April, the agent of Mr. Potter arrived in Boston, and by his counsel, Seth J. Thomas, Esq., made a complaint before George T. Curtis, Esq., a Commissioner of the Circuit Court of the United States, and obtained from him a warrant for the arrest of Sims, upon which after a considerable struggle, during which one of the officers received a flesh wound in the thigh, he was arrested on the evening of that day by a deputy of the marshal, and confined in a room in the court-house, which is under the control of the marshal, where he was detained, except when in Court, during the whole of the proceedings.

The examination upon the complaint was commenced on the next morning (Friday, April 4,) and adjourned until Saturday, when the evidence of the complainant was closed, and, no testimony being offered on the part of Sims, the arguments in the case and upon the law were set down for the following Monday, on which day Hon. Robert Rantoul, Jr., counsel for Sims, spoke for six hours. On Tuesday morning he resumed and finished his argument. Mr. Loring upon the same side, finished his argument that morning, and was followed by Mr. Thomas in the afternoon. When Mr. Thomas had concluded, the Commis-

sioner adjourned his court until Friday, the eleventh, to enable him to prepare his opinion; the intervening Thursday being the annual Fast-day in Massachusetts. On Friday, the Commissioner, having delivered his opinion, granted the proper certificate to the claimant, who made the necessary affidavit, and the marshal was directed to assist in getting the slave home. Early on Saturday morning Sims was put on board the brig Acorn, bound for Savannah, which was towed to Nantasket Roads, and there anchored, in consequence of head wind, until Sunday morning, when the wind proving favorable she sailed, and arrived in Savannah on the twenty-fifth of April.

The documentary evidence put into the case by the counsel for the claimant was the transcript of a record made by and before the Hon. Henry R. Jackson, Judge of the Superior Court of the eastern division of Georgia, signed by the judge and attested by the signature of the clerk, and the seal of the Court, by which the fact that Sims owed service and labor to James Potter, and that he had escaped, was made out. The power of attorney from Potter to Bacon, the agent of Potter, was in writing and in due form, but was acknowledged and certified under the hand and seal of Robert M. Charlton, notary public. To this power of attorney and acknowledgment was appended a certificate, in due form, of the clerk of the Inferior Court of Chatham county, —

"That Robert M. Charlton, whose signature appears above, and which is recognized by me as genuine, is a public notary of the county of Chatham aforesaid, duly appointed by the Inferior Court of said county, and commissioned and sworn, and residing in the city of Savannah in said county of Chatham; and I further certify, that said Robert M. Charlton, as such notary public, is authorized by the laws of the State of Georgia to take the acknowledgments of deeds and other instruments in writing, executed in the County of Chatham and State of Georgia aforesaid, — and that his attestation above written is in due form of law. Witness," &c.

Two witnesses were introduced to prove the identity. One of them testified that he had known Sims for the last ten months in Savannah; that he there bore the name of Thomas Sims; that he (the witness) worked on the same scaffolding with Sims as a bricklayer, in August and September last; that he once asked Sims if he was a slave, and that Sims replied that he was the slave of James Potter, a rice planter, who lived ten or twelve miles from Savannah; and that he had to pay his wages to Mr. Potter monthly, to the amount of about ten dollars

per month. The other witness was the agent of Mr. Potter, who came here to make the arrest. He testified that he had known Sims as the property of Mr. Potter for fifteen years; that Sims had lived for the last ten years in Savannah, accounting to Mr. Potter for his wages, and that he knew this from being present when they were paid to Mr. Potter by the mother, and by Sims, and by repeatedly seeing his mother go after him for his wages. Both of the witnesses had seen, and knew, Sims's mother and sister in Savannah. Both of the witnesses were subjected to a rigorous and searching cross-examination, to ascertain whether they had any interest in the result of the proceedings; but none was elicited. No attempt was made in the argument to assail or shake their testimony. The correspondence between Sims's appearance and the description in the record, was also relied on as proof of identity.

No evidence was introduced for the defence. An affidavit by Sims was put in as a reason for a long postponement — that he was born in Florida; that he had been free as long as he could remember; that his free papers, obtained many years ago by his father in St. Augustine, Florida, were probably now in the hands of Morris Potter of Savannah, and that he never knew or heard of James Potter, who now claims him as a slave, until that morning. The Commissioner declined to entertain a motion upon this affidavit, as by the statute the testimony of the alleged fugitive could not be taken as evidence.

The counsel for Sims submitted and argued the following propositions:

1. That the power which the Commissioner is called upon to exercise is a judicial power, and one that, if otherwise lawful, can be exercised only by a judge of the United States' Court, duly appointed, and that the Commissioner is not such a judge, as he has no certain tenure of office and no stated salary.[1] 2. That the procedure is a suit between the claimant and the captive, involving an alleged right of property on one hand, and the right of personal liberty on the other, and that either party, therefore, is entitled to a trial by jury; and that the law which purports to authorize the delivery of the captive to the

[1] Constitution of U. S., Art. 3. § 1 and 2; *Cohens* v. *Virginia*, 6 Wheat. 379; *Prigg* v. *Pennsylvania*, 16 Peters, 616; *Parsons* v *Bedford*, 3 Peters, 446.

claimant, denying him the privilege of such trial, and which he here claims under judicial process, is unconstitutional and void.[1] 3. That the transcript of testimony, taken before the magistrates of a State Court in Georgia, and of the judgment thereupon by such magistrates, is incompetent evidence, Congress having no power to confer upon State Courts or magistrates judicial authority to determine conclusively, or otherwise, upon the effect of evidence to be used in a suit pending, or to be tried in another State, or before another tribunal.[2] 4. That such evidence is also incompetent; because the captive was not represented at the taking thereof, and had no opportunity for cross-examination.[3] 5. That the statute under which the process is instituted is unconstitutional and void, because it is not within the powers granted to Congress by the Constitution, and because it is opposed to the express provisions thereof.[4] 6. That the power of attorney under which the claimant claims to act here, is not such a power of attorney as is provided for in the statute, and that therefore no person has authority to claim this colored person as held to service; the notary public before whom it was certified and acknowledged, not being such a legal officer as the statute contemplated.[5] 7. That the process before the Commissioner is not a preliminary procedure in the matter of extradition, but that it is a final adjudication and settlement of the present rights of the parties;[6] the certificate of the Commissioner giving to the claimant a right to the immediate possession and control of the captive, with power to remove him — absolute, and unimpeachable by any human tribunal.

The counsel for the claimant argued that

1. The Constitution of the United States recognizes slavery, and consequently the relation between master and

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[1] Amendments to the Constitution, articles 5 and 7; 3 Story's Comm. on Const., pp. 506, 661, § 1639, 1640, 1783; Coke's 2d Institute, vol. 1, chap. 29, pp. 50, 53, 54; *Lee* v. *Lee*, 8 Peters, 44.

[2] Const. U. S., Art. 3, § 1; *Martin* v. *Hunter's Lessee*, 1 Wheat. 327, 330, 333.

[3] *Bradstreet et al.* v. *Neptune Ins. Co.*, 3 Sumner, 608.

[4] Constitution of the U. S., Art. 1, § 1, Art. 2, § 1, Art. 3, § 1, Art. 4, § 1 and 2; Constitution of Massachusetts, Part 2, chap. 1, § 1, Art. 4, Bill of Rights, Art. 4.

[5] Act of Sept. 18, 1850, § 6; Laws of Georgia, vol. 3, p. 1072, vol. 4, p. 221; Prince's Digest of Laws of Georgia, pp. 155, 179.

[6] Act of Sept. 18, 1850, § 9 and 10.

slave, in virtue of which relation, it being like that between parent and child, master and apprentice, bail and principal, the master may seize his fugitive slave, without warrant, wherever he can find him, as well in a free state as a slave state. 2. The Constitution of the United States not merely recognizes slavery, but expressly undertakes that fugitive slaves shall be given up on claim; and the act of 1793 was passed in pursuance of such undertaking, to facilitate such reclamation. The act of 1850 furnishes some additional facilities to the same end, but in no respect differs in principle from that of 1793. 3. The power exercised in these cases is simply a ministerial power, involving the finding of facts for a limited and specific purpose, and the determination of rights for the time being only, and not of ultimate rights, the general purpose being extradition, the immediate object merely a certificate of safe conduct with the fugitive to the state whence he escaped, free from molestation by individuals and processes of other Courts. 4. And therefore Congress has rightly conferred this power on Commissioners, without the intervention of a jury. 5. The act of 1850, in making the record of the Court of Georgia evidence in this case, does not undertake to confer judicial authority upon a state Court, but simply prescribes, as Congress is authorized to do, what shall be taken to be evidence in the Courts of the United States in these proceedings. 6. The purpose being merely extradition, no objection can be made that the evidence was taken *ex parte*.

The Commissioner, in giving his opinion, admitted that a claim for a fugitive slave was a case between parties arising under the Constitution of the United States, and that it belonged to the judicial power of the United States, and maintained that, as it belonged to the judicial power of the United States, it was for Congress to decide in what mode, to what extent, and under what forms of proceeding that judicial power should be called into exercise, in order to give effect to the right of the owner claiming a fugitive slave. The question to be decided was, whether the form of procedure, authorized by the act of Sept. 18, 1850, was such a form of exercising the judicial power as it was competent for the General Government to employ.

In all governments formed upon the English model, and having their executive, judicial and legislative departments distinct, there is in the administration of the laws a certain

class of inquiries, judicial in their nature, but which are confided to officers not constituting a part of the judiciary strictly so called. A master in chancery in England, performs duties in their nature judicial, yet he has never been regarded as a judge. So a sheriff in England has a judicial capacity, and performs several judicial functions,[1] yet a sheriff is appointed only for a year, and receives no salary. In Massachusetts, the law has made it the duty of the sheriff, when presiding at trials by juries summoned to assess damages for laying out highways, to direct the jury on questions of law, if either party request, and to decide questions of law, arising at the trial. So auditors, Commissioners in insolvency, and county Commissioners exercise a judicial power. The practice then in Massachusetts shows that it is well understood that there are certain judicial functions having special objects, which are and must be exercised by inferior officers, not appointed, commissioned, or qualified, as the Constitution of the State requires judges to be appointed, commissioned, and qualified. So under the laws of the United States the same usage has prevailed. The Commissioner of patents exercises judicial power. His decision upon claims of rival inventors, involves the adjudication of matters of law and of fact, and moreover is final as to a present right. No one has ever thought of complaining of the creation of this office as an improper mode of exercising the judicial power of the United States. Commissioners of the Circuit Court of the United States were first appointed to take bail and affidavits in civil cases. Afterwards authority was given them to take depositions to be used in the Courts of the United States. Nine years since their powers were further extended to enable them to arrest and imprison for trial persons committing offences against the laws of the United States. During this period, they have been in the constant exercise of a part of the judicial power of the United States. Their decision in such cases is final and conclusive for a special purpose, and settles a present right. It has never been intimated that they should have been first appointed by the President, and commissioned for life.

The rendition of fugitives from service, under the Constitution, is an act analogous to the rendition of fugitives from justice, and the two cases, so far as the powers and duties of the General Government are concerned, are of

[1] 1 Black. Comm. 343.

the same general character, and may appropriately be provided for by the same general means.[1] The purpose of proving in the one case that the person claimed was held to service and has escaped, and in the other, that he has committed a crime, is simply to establish the right of removal. Nor does the fact, that the fugitive from service is surrendered to his owner, while the fugitive from justice is surrendered to the State, have a tendency to show that the proceedings here, in either case, are a trial of any thing more than the right of removal. In both cases the Government of the United States surrenders the fugitive, or provides for his surrender to the party to whom it has stipulated that he shall be delivered up. In the cases of fugitives from service, there may be practical difficulties, or improbabilities, as to a trial after the fugitive has returned. But the Government of the United States, in making the surrender which it has stipulated to make, is not constitutionally bound to stipulate for a trial, and its omission to do so, does not make these proceedings final and conclusive, instead of ministerial. There may be, on the other hand, practical means, and provisions well known to be made by the Slave States, for trying these questions of freedom by process instituted for the express purpose. The General Government has as clear a right to look to one class of probabilities as to the other. Its looking to the one, and not to the other, does not make its own proceedings, clearly designed to be ministerial and to secure only the limited right of removal, a full and final trial of a right which it obviously intends to leave to another government to adjudicate, upon the faith that it will do justice to its own subject. If this be so, and there is no doubt that it is, this proceeding is not a suit at common law, in which either party can, as a matter of right, demand a trial by jury. The decision of the Supreme Court of the United States in Prigg's case, that the law of 1793, which also withheld a trial by jury, is constitutional in all its leading provisions, fully disposes of this question.

The objection that the transcript of the record is incompetent evidence, is answered by the view taken of the nature and character of this proceeding, and by the de-

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[1] 3 Story Comm. on Const. § 1806; *Prigg* v. *Penn.* 16 Peters, 611; *Wright* v. *Deacon*, 5 Serg. & Rawle, 62; *Jack* v *Martin*, 12 Wend, 311; *Glen* v. *Hodges*, 9 Johns. 67; *Commonwealth* v. *Griffith*, 2 Pick. 11.

cision of the Supreme Court of the United States, in the case of Prigg; for if it is true, as the Court there declared, that state magistrates may, if they choose, exercise the whole of this jurisdiction, find every fact involved in the inquiry, and grant a certificate upon such finding, it is surely competent for Congress to confer upon a State magistrate authority to exercise a part of this jurisdiction, and to make a part of this inquiry. That the finding of a State magistrate upon that part of the inquiry which he is authorized to make, is made conclusive upon the Commissioner here, who is to find the other fact, and to do something therein, is in strict analogy to a class of cases, where officers, who are not part of the judiciary, are directed to make certain inquiries, and to find certain facts which are to have certain legal consequences, when presented to a tribunal authorized and directed to act thereon.

To the further objection to the competency of the evidence, on the ground that Sims was not present at the taking thereof, and had no opportunity to cross-examine witnesses, it was answered, that Sims cannot now complain that he had no opportunity to cross-examine the witnesses, for as it was proved that he had escaped from service in Georgia, his absence therefrom, and the consequent impossibility of being served with notice, were in his own wrong.

In answer to the fifth proposition maintained by the counsel for Sims, that Congress has no power to legislate on the subject of the surrender of fugitive slaves at all, but that it is a power and duty belonging exclusively to the States, the Commissioner referred to the decision in Prigg's case, and besides briefly stated his view "of a question which has long been part of the settled law of this country."

The Commissioner decided that a notary public was a legal officer within the meaning of the statute, and that the power of attorney was properly acknowledged and certified. His authority, as a certifying officer to the written acts of individuals intended to be used in another country than that where they are executed, does not depend upon the local law, but upon the nature of his office, as understood and admitted every where; and in this respect he differs essentially from many other magistrates. *Lord Kinnaird* v. *Lady Saltoun*, (1 Mad. Ch. R. 227.)

During the hearing before Mr. Curtis, the counsel for Sims (Mr. Sewall) read a certificate of the Clerk of the Po-

lice Court, that Sims was under a recognizance to appear at the next term of the Municipal Court as a witness, in a case of larceny, and suggested that it raised the question whether James Potter's right of property should override the right of the Commonwealth to the services of Sims as a witness in one of her Courts. The Commissioner decided, that it would be time enough to consider the question when he was served with a process from any Court demanding Sims. It was also stated, that a telegraphic despatch had been received that Sims was a free man, and delay was asked to obtain proof of the fact, which the Commissioner declined to grant.

These were the proceedings before the Commissioner. Meanwhile resort was had to various expedients to get Sims out of the custody of the marshal, and to test the constitutionality of the law. First in order were the applications to the Supreme Court then in session, for a *habeas corpus*, on the mornings of the 4th and 7th of April, but without success, as will appear from the opinion of the Chief Justice, which is given in this number.[1]

Five different applications were made to Judge Sprague, of the District Court of the United States for legal process from that Court. The first was for the Court to appoint a guardian *ad litem* to bring an action for Sims against the marshal for the ravishment of his ward. The applicant was heard, and was requested to bring authorities for such a procedure. The authorities were not produced. The second application was for a *habeas corpus*, on the ground that the law was unconstitutional, particularly in giving jurisdiction to Commissioners. After a full hearing the Judge gave his opinion, sustaining the constitutionality of the law, and the writ was refused. Next came a petition for an injunction. The statement was, that an action at law had been commenced in the Circuit Court of the United States by Sims, alleged in the writ to be a citizen of Georgia, against the marshal for damages for the arrest: that a bill in equity had also been filed for a discovery in aid of the suit at law, and the application was for an injunction to stay, meanwhile, the proceedings before the Commissioner. After a hearing, the injunction was refused. There was then a second application for a *habeas corpus*, because the marshal was illegally neglecting and refusing to bring Sims before the Commissioner on a criminal war-

[1] See post, p. 17.

rant for an assault. But as the petition itself stated that the marshal held Sims as well on the civil as on the criminal process, the writ was refused. The last request made of this Court was to appoint, under the statute, some proper person to serve on the marshal a writ of personal replevin which had been sued out of the Circuit Court of the United States. As this was a process issuing out of the Circuit Court, the applicants were referred to the Judge of that Court, then in the city.

When this motion was made before Judge Woodbury, on Friday, the 11th, the Commissioner had closed the case and granted a certificate to the agent of the claimant. Mr. Thomas informed the judge of the fact, read the certificate, and claimed to be admitted on the record in the case as the attorney of Potter, and thereby of Sims. Judge Woodbury held, that by virtue of the certificate of the Commissioner, Mr. Thomas had now the better right to appear in behalf of Mr. Potter and of Sims; and he should so decide, unless the counsel (Mr. Sewall) wished to question the constitutionality of the law under which the Commissioner had acted; and if so, he would give an opportunity for a hearing. This motion then subsided.

Foiled in their other attempts, the counsel for Sims, on the evening of Thursday, April 10th, (Fast-day,) applied to Judge Woodbury for a writ of *habeas corpus.* The petition alleged that the criminal warrant issued by Mr. Hallett, on which Sims was held, was bad in itself, and that the marshal was guilty of unnecessary and improper delay in not bringing Sims before the Commissioner for a hearing. An affidavit by Sims was also put in, that he believed that the warrant from Mr. Hallett was not issued for the purposes of trial, but fraudulently to prevent his getting a trial by jury on his claim for freedom; and that the warrant was a trick against his freedom. An *ex parte* argument of considerable length was had upon the motion, when Judge Woodbury remarked,

That two grounds seemed to be relied on,—one was the insufficiency of a warrant which had been issued against Sims for an assault on Butman when serving process; and the other was the illegal delay by the marshal in not having Sims earlier examined by the Commissioner on the warrant.

He agreed with the other judges in this city, that where all the facts were before them, necessary to a correct decision on the discharge of the prisoner, they might be examined, and the writ not issued, if nothing could result from it but delay and expense, or embarrassment to other proceedings. Yet if some facts were wanting, as here, for example, what other process had been served by the marshal on which also with this

warrant he held Sims, and whether it was still in the course of being executed so as to excuse him for not carrying Sims before a Commissioner on this, it furnished a good reason to issue the *habeas corpus* at once, in order that the marshal might return these facts. He could now decide on the validity of the warrant on its face, the first point, as a copy of it was now before him, but he could not decide on the second point without further and official evidence of what other process was in the hands of the marshal against the prisoner, and how it operated, if at all, on the delay. Where real doubt existed whether the marshal ought to be required to return more facts, he felt bound to incline in favor of liberty.

The writ must issue.

In about an hour the prisoner was brought before the judge, and the marshal made return that he held Sims on the civil processs as well as on the warrant issued from Mr. Hallett, and that in the exercise of his official discretion, he had not yet carried him before the Commissioner. A motion was then made by Sims's counsel for delay until Saturday. The judge, with some hesitation, postponed the hearing until Friday afternoon at three o'clock, at which time it was resumed. The marshal meanwhile made an additional return, that he held Sims under the certificate of the Commissioner. Charles Sumner, Esq., counsel for the petitioner, moved that an attachment issue against the marshal for not returning more specifically the date and cause of the arrest and detention of Sims. This the judge refused, as the presumption was that the marshal received and served the warrant on the day of its date, unless otherwise stated in the return, and that this was most favorable to the petitioner, as the longest time of detention would be strongest against the marshal.

Mr. Sumner then, after arguing the main question, proposed to offer witnesses to prove fraud in the criminal process in question, and in connection with the other process against Sims, as a fugitive. The District Attorney, (Mr. Lunt) being present, stated that he had caused the criminal proceedings to be instituted before Mr. Hallett, had regulated them thus far, and was responsible for their conduct. The counsel for the marshal objected to any evidence against his return. Judge Woodbury said, substantially,

That if the counsel for the prisoner could show that there was no foundation, either in fact or law, for the complaint against Sims, but that it had been got up falsely and fraudulently by the marshal, or by others, with his consent or connivance, he was inclined to receive the evidence. It is true, that the writ of habeas corpus is a proceeding, in some respects, peculiar in character. It is not like an action between parties, or an indictment on which issues can be made and tried by a jury. It is a writ, too, which though justly sacred with our fathers, and dear to our fathers' fathers near

two centuries ago — is to be acted on by the judge who issues it, and under certain rules which have been from time to time wisely established to regulate his discretion. He desired the counsel to point him to a case during that whole period, where an inquiry like this had been gone into with witnesses, on the hearing of the habeas corpus.

(The counsel said he could refer to no such case.)

The Judge added, that the twelve Judges of England were about a century ago asked by the House of Lords for their opinion on this and other points, and all but two or three thought the evidence inadmissible. Parliament then passed an act not requiring the receipt of such evidence on this hearing, but allowing the judge, on affidavits, when he pleased, to ascertain the truth of any material facts or allegations. This was a reasonable act, and he would enforce its principle in the broad discretion which all judges possessed in such hearings, and allow any proof to be given by witnesses which would show any fraud in the charges made in the complaint, or any false and wrongful conduct by the marshal in obtaining it. But it would be quite too remote, collateral and unimportant here to inquire whether the effect of this movement might not be to help protect the prisoner from an arrest on another like warrant, issued by a state magistrate, on the application of one of his own counsel, and to inquire which was most legitimate or *bonâ fide*.

Mr. Sumner said he had no evidence to show fraud in the charge made in the complaint, but he

Asked the discharge of Sims on the proofs and documents now before the Court; showing, first, the warrant to have been bad in form and substance, and showing next an illegal delay in executing it, and one which by itself raised a presumption of fraud in the marshal. And, if these failed, he moved that the Judge himself now hear and examine the criminal charge against Sims; or, if declining that, to admit him to bail upon it.

The arguments being finished, Judge Woodbury gave his decision in substance as follows:

'The proceedings before me are not an application to discharge from the custody of the marshal, the prisoner Sims, as a fugitive slave, but the petition for the habeas corpus is confined exclusively to the allegation of his being held by a criminal warrant, which issued on a complaint for an assault on an officer of the United States while executing legal process, and it asks merely that he may be discharged from custody so far as held under that warrant. The writ of habeas corpus, by which he has been brought before me, is also confined specially to the same inquiry.

The first objection is to the legality of the warrant on its face. But every professional man knows the difference between a warrant to bring the party before a magistrate for examination and a final warrant of commitment in execution of a sentence — or a warrant to search the premises of a suspected person. The cases cited, where warrants are bad on their face, are all of this last character, and not of the kind like this. Besides here, in the warrant itself, the respondent is referred to what "is more fully set forth in" the complaint, as the cause for which he is to be arrested and tried. And in the return of the marshal a copy of the complaint is included, and is conceded to contain every allegation necessary to give jurisdiction to the Commissioner and justify the arrest. * * *

The second ground for claiming a discharge of the prisoner is, the delay in taking him before the Commissioner to be examined on this criminal complaint, and the exceptionable facts connected with it.

The usual course in criminal proceedings is to have an examination follow speedily the arrest, and an unnecessary and injurious delay is censurable. But that can seldom render the warrant invalid, or entitle the prisoner to an absolute discharge, though it may properly expose the officers who do it to a civil action at times, or cause an indictment. But here the return showing an earlier arrest by another process, and a detention under it up to the present time — he had not been imprisoned or detained a single hour by this alone. There was by it, therefore, no imprisonment or injury.

Now was the marshal under these and other facts excusable for this delay? The design in issuing the writ was to have before him officially the reason for it — as it might be justifiable by the sickness of the prisoner, magistrate or marshal — or by the wish of the prosecutor and assent of the accused to delay — or the pendency of other prior legal proceedings. It turned out to have been the latter, and considering the menaces uttered of violence — considering the array of force around and near us to prevent a rescue of the prisoner — it furnishes an unusual and weighty reason not to expose him abroad — in going from office to office, and from one kind of examination to another, to the imminent danger of escape, till the previous one was completed, and till it could be done with safety. The more especially was this prudent when not thereby causing the prisoner's detention, but a prior precept doing that.

But it is strenuously urged that this, being a criminal warrant, should, at all risks, be examined before the other, which is supposed to be only a civil proceeding. Without inquiring now, whether that be merely civil in character — this is not the case of the marshal having both precepts at once, and then serving the civil one first. Such a course might not always be proper. But he had what is called the civil precept first, and served it first, and while serving it the offence was committed by the prisoner for which the criminal warrant issued.

Both of these leading objections to the warrant and conduct of the marshal fail, therefore, to make out a case which would justify Sims's discharge from the criminal warrant.

But two other motions have been made this afternoon, which require a few minutes' consideration. One is, that the judge, sitting as he is now, in chambers, should hear the case to which the warrant refers, when the original complaint is not before him, and when a Commissioner could, and doubtless would, discharge that duty, if requested by the complainant or district attorney, and when neither of the latter desire it now, and when the prisoner was brought before him now for another and specific object.

The other motion is to admit him to bail. But that duty belongs to the magistrate before whom he is taken for examination, and no other has a right to interfere, unless refused by him, or bail is required in an unreasonable amount.

Both of these motions are therefore overruled.

Let the prisoner be remanded to the custody of the marshal, as before this writ of *habeas corpus* issued.

There were other incidents connected with this case. On Friday, April 4th, (Sims had been arrested the night before,) a petition was presented to the House of Representatives, then in session, for leave to hold a public meeting in the State-house yard that afternoon, to take into consideration the arrest of a citizen under the fugitive slave law, and to devise proper and legal measures for the defence and protection of the citizens of Massachusetts against such

arrests. The petition was laid on the table. That afternoon a meeting was had on the Common, where violent speeches were made, and advice to resist the law with force was given. On the next day (Saturday) there was presented to the Senate the petition of Sims, setting forth that he had been arrested as a fugitive from service; that he had been refused a writ of *habeas corpus;* that he was a citizen of Massachusetts, and he, therefore, asked the intervention of the Legislature, to pass a law granting him a writ of *habeas corpus.* This petition was also laid on the table.

Monday, the 7th, Richard Hildreth, Esq., justice of the peace for the county of Suffolk, upon the complaint of Charles List, Esq., of counsel for the fugitive Sims, issued his warrant, returnable to the Police Court, against Sims, for an assault, with intent to kill, upon Butman, the assistant of the deputy marshal, at the time of his arrest. The party injured was no party to the complaint; and it is understood, that since the establishment of the Police Court in 1822, this is almost the solitary instance of a justice of the peace within the county of Suffolk issuing a warrant while the Police Court is in session. The warrant was put for service into the hands of deputy sheriff Coburn, who attempted to make service of the same on the marshal. The same day Mr. Hallett, Commissioner of the Circuit Court of the United States, upon the complaint of Butman against Sims, for an assault upon him while engaged in serving legal process, issued a warrant for the arrest of Sims, which was placed in the hands of the marshal for service, before Mr. Coburn attempted to serve the State process on Sims. There had also been a writ of personal replevin, under the State statute, sued out against the marshal for the body of Sims, and a demand was made upon the marshal for Sims. The marshal, after taking the best legal advice in the city, refused to surrender Sims upon either process; and informed the officer that he should use sufficient force and no more, to prevent his being taken out of his hands. The sheriff of Suffolk, upon consultation with the governor, and by his request, obtained the opinion of the attorney-general of Massachusetts, and of the district attorney for the county of Suffolk; which was, that, under the circumstances, the marshal could hold Sims against either or both of the State processes, "priority of possession under the warrant conferring the better title."

Mr. Hildreth also issued a warrant returnable to the Police Court, against the master and mate of the brig M. & J. C. Gilmore, for an assault, and for false imprisonment, in confining Sims on board the vessel, after he was discovered in the forecastle. They went before the Police Court, but through a defect in the complaint, (it was not made under oath) they were discharged, the complainant not being at hand to amend it. On Saturday, the 12th, while the Acorn was in the roads, a constable with a posse went in a boat to arrest Ames upon another warrant issued by Mr. Hildreth for an assault on Sims, but the Acorn on account of the head winds could not be reached. A new warrant for the arrest of Sims was placed in the hands of the sheriff on Saturday morning, while Sims was on board the Acorn, but it was not served.

Suits were instituted in the name of Sims, against the agents of Potter, and the damages were laid at $5,000.

From the morning of the 4th, until Saturday the 12th, the side-walks on the eastern and western sides of the court-house, were kept clear by chains, and a strong force of police was in and about the building. These precautions were taken, by the City Marshal of Boston, under the authority of the Mayor and Aldermen, in order to preserve the public peace. Directions were given the officers not to obstruct those who had business with the Courts.

The statement of this case has extended to such a length, that there is no room for comment, if any were necessary. Enough was done to show that the law can be executed; enough was done to satisfy the friends of the fugitive, that every legal expedient and device were resorted to for his benefit.

Recent American Decisions.

Supreme Judicial Court of Massachusetts. — Monday, April 7, 1851.

Present, Chief Justice Shaw, and Justices Fletcher, Metcalf, and Bigelow.

Thomas Sims, *Petitioner for a Writ of Habeas Corpus.*

Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown; but when it appears from the party's own showing, that there

is no sufficient ground *primâ facie* for a discharge, the Court will not issue the writ.

How far it is competent for one Court by a writ of *habeas corpus* to the executive officer of another Court, after the prisoner has, by the execution and return of the warrant, come under the control of such Court, to take a prisoner from the custody of another Court or tribunal — *Quære.*

Under article i. sec. 8, and article iv. sec. 3, of the Constitution of the United States, Congress has authority to pass a law for the reclamation of fugitive slaves.

The Act of Congress of Sept. 18, 1850, being the same in principle as, and differing only in its details from, the Act of Congress of Feb. 12, 1793, which has been decided to be constitutional, is constitutional. The authority conferred by it upon commissioners of the Circuit Court, and its making no provision for a trial by jury in favor of the alleged fugitive, do not make it unconstitutional.

The substance of the petition is stated in the opinion of the Court, which, after argument by Mr. Rantoul upon the unconstitutionality of the law, was given by Chief Justice Shaw.

"This is a petition for a writ of *habeas corpus*, to bring the petitioner before this Court, with a view to his discharge from imprisonment, upon the grounds stated in the petition. We were strongly urged to issue the writ, without inquiry into its cause, and to hear an argument upon the petitioner's right to a discharge, on a return of the writ. This we declined to do on grounds of principle and common and well settled practice. Before a writ of *habeas corpus* is granted, sufficient probable cause must be shown; but when it appears upon the party's own showing that there is no sufficient ground *primâ facie* for his discharge, the Court will not issue the writ. And on a slight recurrence to the cases, we are of opinion that this is the established rule and practice at common law. Indeed the ordinary course is, for the Court applied to, to grant a rule *nisi* in the first instance to show why the writ should not issue. Of course if sufficient cause is shown, it will be withheld. (*Marsh's case*, 3 Bulstr. 27.) And in *Hobhouse's case*, (3 B. & Ald. 420,) the question came before the Court and was fully discussed. It was then considered that whether the writ of *habeas corpus* were claimed at common law or under the statute, a proper ground ought to be laid before the Court, previously to granting the writ. It is not granted as a matter of course; and the Court will not grant the writ of *habeas corpus* when they see that, in the result, they must remand the party. The Court in that case, which was a commitment by the House of Commons, upon an urgent claim

that it was a matter of right, and some colorable authority cited in support of it, had granted the writ in the first instance, and, on its return, stated the reason why it should not have been done.

We think the same rule and practice have prevailed in this country, but have no time now to examine the authorities particularly. Indeed, by necessary implication, it is the fair result of the provisions of the *habeas corpus* act of this Commonwealth, (R. St. ch. 111, sec. 3,) which requires, in all cases of an application for the writ of *habeas corpus*, that the party imprisoned, or some person in his behoof, shall present a petition, and if held under legal process, or color or pretence of legal process, he shall annex a copy of the process, under which the respondent claims to hold and detain him, or make proof by affidavit, that a copy of such writ or warrant has been applied for, and refused. But why annex a copy of the process, unless it be to enable the Court to form an opinion whether the party is rightly held in custody or not; and why form an opinion in that stage of the proceeding, if it is to constitute no ground for judicial action? It is urged that this is a writ of right, and therefore grantable without inquiry. But it is not a writ of right in that narrow and technical sense; if it were, the issuing of it would be a mere ministerial act, the party claiming it, might go to the clerk and serve it, as he may a writ on a claim for land or money. No: but it is a writ of right in a larger and more liberal sense, a right to be delivered from all unlawful imprisonment. Nor does this limit or restrain the full and beneficial operation of this writ, so essential to the protection of personal liberty. The same Court must decide whether the imprisonment complained of, is illegal; and whether the inquiry is had, in the first instance, on the application, or subsequently on the return of the writ, or partly on the one, and partly on the other, it must depend on the same facts and principles, and be governed by the same rule of law. It is upon these grounds, that we stated on the presentation of this, or a somewhat similar petition, that no sufficient cause appeared upon the petition for granting a writ; and upon further consideration we now repeat, that when it appears on the party's own showing in the petition, that if brought before the Court, the petitioner would not be entitled to a discharge, the Court will not issue the writ.

We are then to examine the petition, accompanied as it

is, by a copy of the warrant under which the marshal of the district claims to hold him, and the return thereon. It there appears that the petitioner has been arrested and is claimed as a fugitive from labor, upon a warrant issued by George T. Curtis, Esq., a Commissioner of the Circuit Court of the United States, in pursuance of a law of the United States, passed by Congress, and that the deputy marshal has returned the warrant to the Commissioner who issued it, and has the body of the petitioner before the Commissioner, for the purposes expressed in the warrant.

An obvious question occurs here, how far it is competent for this Court, by a writ of *habeas corpus* to the marshal to take a prisoner from the custody of another tribunal, Court or magistrate, of whom such marshal is the executive officer, and after the prisoner has, by the execution and return of the warrant, been placed under the control and direction of such Court or magistrate, to be held, discharged, brought in, or removed. This point has not been noticed in the argument, and is not perhaps of much importance, and perhaps it might be avoided by an amendment of the petition. But we have thought it worthy of a passing remark, as one of those considerations, which presented themselves to our minds, after a similar one had been submitted on a former occasion, indicating that apparently, and on the face of the proceedings, the petitioner was in regular and lawful custody.

It is now argued, that the whole proceeding, as it appears upon the warrant and return, is unconstitutional and void, because, although the statute of the United States of 1850 has provided for, and directed this course of proceeding, yet that the statute itself is void, because Congress had no power, by the Constitution of the United States, to pass such a law, and confer such an authority. The ground of argument leading to this conclusion is, that it is not competent for Congress, under the power of legislation vested in them by the Constitution, to confer any authority, in its nature judicial, upon any persons, magistrates, or boards, other than organized Courts of justice, held by judges, appointed as such, and to hold their offices during good behavior, and paid by fixed salaries; whereas the Commissioners, designated by the law in question, do not hold their offices during good behavior, nor are they paid by fixed salaries. This is the argument.

We are called on to consider two questions; first, Whe-

ther Congress has authority to pass any law on the subject; and second, whether the law actually passed did, in any respect, of which the petitioner has a right to complain, violate the provisions of the Constitution. These are grave questions, and it is impossible to approach them, without a deep sense of responsibility which must rest on any judicial tribunal, when called upon to deliberate upon the constitutionality of any legal enactment adopted by the highest legislative body of the Union, and passed under all the forms required to give it the sanction of law.

The subject-matter of this act is the return and restoration of fugitive slaves, designated in the Constitution as persons held to service or labor in one State under the laws thereof, escaping into another. The whole provision, (Art. 4, sec. 2,) is as follows: "No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor; but shall be delivered up, on claim of the party to whom such service or labor may be due."

Bearing in mind the circumstances under which this provision of the Constitution was adopted, the relations of the several States to each other, and the manifest object which the framers of the Constitution had in view, we are to look at the clause in question, to ascertain its true meaning and effect. We think it was intended to guarantee to the owner of a slave, living within the territory of a State, in which slavery is permitted, all the rights conferred upon such owner, by the laws of such State, and that no State should make its own territory an asylum and sanctuary for fugitive slaves, by any law or regulation, by which a slave who had escaped from a State where he owed labor or service into such State or territory, should avoid being reclaimed. It was designed also to provide a practicable and peaceable mode, by which such fugitive, upon the claim of the person to whom such labor or service should be due, might be delivered up.

But the right thus secured by the Constitution to the slave owner, is limited by it, and cannot be extended, by implication or construction, a line beyond the precise *casus fœderis*. The fugitive must not only owe service or labor in another State, but he must have *escaped* from it. This is the extent of his right. It is founded in the compact and limited by the compact. It has therefore been held, that if a slave is brought into this State by his master, or

in the course of his occupation or employment is brought here, without having *escaped*, he is not within the law provided for by the Constitution. (*Commonwealth* v. *Aves*, 18 Pick. 193; *Commonwealth* v. *Fitzgerald*, 7 Law Rep. 379.)

This results not so much from the voluntary act of the master, in bringing, or permitting him to be brought within the limits of a free State, as because the law by which the person is held to slavery in his own State, is local, and has no extra-territorial operation, and because he is not within the provision of the Constitution, under which he may be lawfully removed, not having escaped.

To the extent, however, to which this privilege or benefit goes, that of securing the return of persons, owing service or labor in one State, who had fled and escaped into another, this provision of the Constitution must be regarded as complete and sufficient to the proposed right. But the Constitution itself did not profess or propose to direct, in detail, how the rights, privileges, benefits and immunities intended to be declared and secured by it, should be practically carried into effect; this was left to be done by laws to be passed by the Legislature, and applied by the judiciary, for the establishment of which full provision was at the same time made. The Constitution contemplated a division and distribution of the powers incident to a sovereign State, between the general government of the United States, and the governments of each particular State; a distribution not depending on local limits, but by selecting certain subjects of common interest, and placing them under the entire and exclusive jurisdiction of the general government; such, for instance, as the foreign relations of the country, the subject of war and peace, treaties, the regulation of commerce with foreign nations, and among the several States, and with the Indian tribes. These are a few of the most prominent subjects, by way of illustration. And the theory of the general government is, that these subjects, in the full extent and entire details, being placed under the jurisdiction of the general government, are necessarily withdrawn from the jurisdiction of the State, and therefore become exclusive. And this is necessary to prevent constant collision and interference; and it is obvious that it must be so, because two distinct governments cannot exercise the same power, at the same time, on the same subject-matter. This is not left to mere implication. But it is expressly declared, (Art. 1, sec. 8,) that Congress shall have power to make all

laws which shall be necessary and proper, for carrying into execution all the powers vested by the Constitution, in the government of the United States, or in any department or officer thereof.

And by Article 6, this Constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties, &c., shall be the supreme law of the land; and the judges in every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding. All such laws, made by the general government, upon the rights, duties and subjects, specially enumerated and confided to their jurisdiction, are necessarily exclusive and supreme, as well by express provision, as by necessary implication. And the general government is provided with its executive, legislative and judicial departments, not only to make laws regulating the rights, duties and subjects, thus confided to them, but to administer right and justice respecting them in a regular course of adjudication, and cause them to be carried into full execution, by its own powers, without dependence upon State authority, and without any let or restraint imposed by it.

It was, as we believe, under this view of the right of regaining specifically the custody of one from whom service or labor is due, by the laws of one State, and who has escaped into another, and under this view of the powers of the general government, and the duty of Congress, that the law of Feb. 12, 1793, was passed. It was passed at the second Congress, so soon after the adoption of the Constitution, that many of the members may be well presumed to have been members of the convention, and all of them to have been intimately conversant with the great principles of the Constitution, and with the views, intentions, and purposes of its framers.

This species of contemporaneous construction has ever been regarded as of great weight and importance, and is entitled to the highest respect. It bears with a great weight of authority upon two points; first, as to the power and duty of Congress to pass laws to secure and carry into effect a right confirmed by the Constitution of the United States; and, secondly, the fitness of the provisions of law thereby adopted, and their adaptation to the proper and practical assertion of the right secured by the Constitution.

The act of Feb. 12, 1793, made for the purpose of providing and declaring the manner in which the claim shall

be made for the fugitive from service, who has escaped, is substantially as follows: That when any person held to labor in any of the United States, or in either of the territories, under the laws thereof, shall escape into any other of the said States or territories, the person to whom such labor may be due, his agent or attorney is empowered to seize or arrest such fugitive, and to take him or her before any judge of the Circuit or District Courts of the United States, residing or being within the State, or before any magistrate of a county, city, or town corporate, wherein such seizure or arrest shall be made; and upon proof to the satisfaction of such judge or magistrate, that the person so seized doth, under the laws of the State or territory from which he fled, owe service to the person thus claiming him, it shall be the duty of such judge or magistrate to give a certificate to the claimant, which shall be a sufficient warrant for removing the fugitive to the State or territory from which he fled.

The manifest intent of this act of Congress was, to regulate and give effect to the right given by the Constitution. It secures to the claimant the aid and assistance of certain magistrates and officers, to enable him to exercise his right in a more regular and orderly manner, and without being chargeable with a breach of the peace. It obviously contemplated a prompt and summary proceeding, adapted to the exigency of the occasion, in aid of a power, in terms conferred by the Constitution on the claimant. It vested the power of inquiry, (whether regarded as judicial or otherwise,) the same power which is now drawn in question, in magistrates of counties, cities or towns corporate. As to the mode of trial contemplated by this act, it is described by Mr. Justice McLean, in his opinion in the case hereafter cited, and in these terms: Both the Constitution and the act of 1793 require the fugitive from labor to be delivered up on claim being made by the party, or his agent, to whom the service is due. Not that a suit should be regularly instituted. The proceeding authorized by the law is summary and informal. The fugitive is seized and taken before a magistrate within the State, and on proof, parol or written, that he owes labor to the claimant, it is made the duty of the judge or magistrate to give the certificate, which authorizes the removal of the fugitive to the State from whence he absconded.

A historical fact is mentioned by the same learned judge,

which may throw some light, not only on the introduction of the constitutional provision, but the form of the law intended to carry it into effect. At an early period, says he, of our history, slavery existed in all the colonies, and fugitives from labor were claimed and delivered up under a spirit of comity or conventional law among the colonies. If such was the practice when the colonies were independent of each other in their municipal laws or regulations, and even after a partial union by the articles of confederation, which made no provision on the subject, may it not be reasonably conjectured that this claim to custody of the person of the alleged slave, when there was no positive law to regulate it, was exercised through the medium of colonial magistrates exercising analogous powers in similar cases; and may not this have suggested the method provided for in the act of 1793?

By the act of 1793, the authority of issuing a warrant to arrest a fugitive from labor, of inquiring into the fact both of owing labor and of having escaped, and the authority of granting a certificate, is conferred on justices of the peace, appointed for a term of years, and without salary, by the State government, or the magistrates of cities and towns corporate. It is very manifest, therefore, that their powers were not deemed judicial by the Congress of 1793, in the sense in which it is now insisted, that the Commissioner before whom the petitioner has been brought, is in the exercise of judicial powers not warranted by the Constitution, because not commissioned as a judge, and holding his office during good behavior. Indeed, it is difficult, by general terms, to draw a precise line of distinction between judicial powers and those not judicial. It is easy to designate the broad line, but not easy to mark the minute shades of difference between them. Those officers who hold Courts and have civil and criminal jurisdiction, beyond doubt, exercise judicial powers. But there are, under every government, functions to be exercised, partly judicial and partly administrative, which yet require skill and experience, judgment and even legal and judicial discrimination, which it is more difficult to classify. So under our own government, in the Constitution of which a similar provision is found, requiring all judicial officers, excepting justices of peace, to be commissioned and hold their offices during good behavior, we find many such cases. Such are bank commissioners, county commissioners, and

sheriffs, when presiding over and instructing juries impannelled to assess road damages, and damages for flooding land; commissioners of insolvency on the estates of deceased persons and of living insolvent debtors, masters in chancery, and many others.

Now, so far as we understand it, commissioners of the Circuit Court of the United States are officers exercising functions very similar to those of justices of the peace under the laws of the Commonwealth. They are commonly appointed from among counsellors at law, and of some standing, and well reputed for professional skill and experience. Their duty is, to inquire into violations of the laws of the United States, to hear complaints, issue warrants, hold examinations, and bind over or commit persons for trial for offences. These are functions requiring considerable skill and experience in the administration of justice, and it is just to presume that they are duly qualified to perform their duties.

Would it not be competent for Congress, under the powers vested in the General Government, to provide by law for the appointment of justices of the peace, in each district, to be vested with powers under the laws of the United States, analogous to those exercised under State laws, by justices of peace under the State Government, without commissioning them as judges during good behavior, and giving them fixed salaries?

At the same time, it may be proper to say, that if this argument, drawn from the Constitution of the United States, were now first applied to the law of 1793, deriving no sanction from contemporaneous construction, judicial precedent, and the acquiescence of the General and State Governments, the argument from the limitation of judicial power would be entitled to very grave consideration.

But we are not entitled to consider this a new question, but one settled and determined by authorities which it would be a dereliction of official duty, and a disregard of judicial responsibility, to overlook.

We have already referred to the great weight to be given in the exposition of statutes, to what may be regarded as contemporaneous construction; and this construction is of the more importance when the question turns upon the constitutionality of a legal enactment, made soon after the adoption of such Constitution, and for the avowed purpose, not only of conforming strictly to the powers given by the

Constitution, but of carrying out the very objects and purposes contemplated by it. To this is now to be added an acquiescence both of the State and General Governments, of their representatives and people, for nearly sixty years, and a series of judicial decisions, by the highest Courts of our own and of the other States; and also of the Supreme Court of the United States, whose authority upon controverted questions, within their jurisdiction, and declared by their judgments, is binding upon the judges of State Courts.

The constitutionality of the act of 1793, came directly before this Court, and was argued and decided in 1823. *Commonwealth* v. *Griffith*, (2 Pick. 11.) The opinion of the Court was delivered by that most humane man, and enlightened magistrate, the late Chief Justice Parker. After disposing of a technical question, he says,— This brings the case to a single point, whether the statute of the United States, giving power to seize a slave without a warrant, is constitutional. After alluding to the relative condition of the States, and the circumstances under which the Constitution was made, he says, they (the States by whose laws slavery was permitted), might have kept aloof from the Constitution. That instrument was a compromise. It was a compact by which all are bound. We are to consider then what is the intention of the Constitution. Again, the Constitution does not prescribe the mode of reclaiming a slave, but leaves it to be determined by Congress. Whether the statute is a harsh one, is not for us to determine. We do not perceive that the statute is unconstitutional, and we think the defence is well made out. The Chief Justice added, that this construction of the statute has been adopted ever since the Federal Constitution went into operation, by Lowell and Davis, justices of the District Court of the United States. To weaken the force of this precedent, it has sometimes been said, when the case has been cited in argument, that this opinion is not unanimous. It is true, that Thatcher, J., dissented from the majority, as to the construction of the law, but did not doubt its constitutionality. He admitted that Congress might prescribe a new mode of apprehending a fugitive from service, which should supersede our law.

In answer to the objection to the constitutionality of this statute, it was pressed upon the consideration of the Court, in the case last cited, that it had been in operation then

thirty years, and its constitutionality, it was true, had never been before questioned. If that consideration had wrought with the Court then, the acquiescence of thirty years more has greatly increased it.

I shall next cite the case of *Wright* v. *Deacon*, (5 Serg. & Rawle, 62), in the Supreme Court of Pennsylvania, and I do it the more readily, because the opinion was delivered by Tilghman, C. J., whose authority was cited in the argument of this case. It arose on a writ *de homine replegiando*, sued out by the person claimed as a slave, against the prison keeper, in whose custody he was detained, under a certificate granted conformably to the act of Congress, of 1793. After saying, whatever may be our private opinions on the subject of slavery, he adds,—It is well known that the Constitution could not have been adopted, unless the property in slaves had been secured, and that this Constitution has been adopted by the free consent of the citizens of Pennsylvania. He then cites the article in the Constitution. But, he said, it required a law to regulate the manner in which this principle should be reduced to practice, and cites the act of Congress made for that purpose, and continues: It plainly appears from the whole scope and tenor of the Constitution and act of Congress, that the fugitive was to be delivered, on a summary proceeding, without the delay of a formal trial in a Court of common law, &c. But if this writ *de homine replegiando* is to issue from a State Court, what is its effect, but to annul the warrant, granted by a magistrate, and thus defeat the Constitution and law of the United States? The Constitution and law of the United States say, that the master may remove his slave by virtue of the judge's certificate; but the State Court says he shall not remove him. It appears to us, that this is the plain state of the matter, and that the writ has been issued in violation of the Constitution of the United States, and that it should be quashed.

The same principles have been decided by the Supreme Court of the State of New York, *Jack* v. *Martin*, (12 Wend. 311.) This case was also commenced by a writ *de homine replegiando*, corresponding with our writ of "personal replevin," by the fugitive and alleged slave, against the mistress. The case is full and decisive. The opinion, as delivered by Mr. Justice Nelson, is very long and instructive, but too long to be quoted here. It affirms the right of the master, as established by the Constitution, the power

and duty of the general government to pass laws to secure the right by suitable and practicable means, the exclusive power of Congress to pass such laws, and the invalidity of all State laws on the subject.

But the judicial authority most to be relied on, and which, when distinctly ascertained, is binding and conclusive, upon all subjects within their special jurisdiction, is that of the Supreme Court of the United States. Before the case hereafter cited, the question had come before Mr. Justice Washington, then of the Supreme Court of the United States on the circuit. *Hill* v. *Low*, (4 Wash. Cir. Ct. R. 329.) He therein expressed his opinion in favor of the constitutionality of the act of Congress to which I refer, without stating it more particularly.

But the case came before the Supreme Court of the United States, in 1842, on a special verdict, and the point in question was fully discussed and deliberately settled. *Prigg* v. *Commonwealth of Pennsylvania*, (16 Pet. 539.)

There was some difference of opinion among the judges, upon minor points, but none, it is believed, upon the subject now under consideration, the constitutionality and binding force of the act of Congress of 1793, and especially of that part of it, which confers an authority on circuit and district judges, and on county and city magistrates, to take a summary jurisdiction, in the manner provided by the act of 1793. Some of the majority were of opinion, that Congress could not, by its own enactments, require State officers, such as magistrates of counties, cities, and towns corporate, to take upon themselves the duty of exercising such jurisdiction; but they conceded, that the law conferred a sufficient authority on them to act, if they should think fit to do so, voluntarily, and were not restrained by State legislation. On the other hand, Mr. Justice McLean, agreeing to the general rule, as to State officers, was of opinion that, under the peculiar circumstances, Congress had the power to enforce this duty upon magistrates, that they were not at liberty to decline it, but were legally bound to execute it.

All the judges were agreed, that the State could make no law, and adopt no regulation, which would impair the right of an owner to pursue and retake a fugitive from labor, but they differed in one particular. The majority were of opinion, that the whole subject being placed under the jurisdiction of the General Government, the State govern-

ments could make no law on the subject, placing their judgment on the ground, that as the whole subject was placed exclusively under the cognizance of the General Government, it was for Congress to make all the rules and regulations upon the subject; that it was to be presumed they had, in the law in question, made sufficient rules and regulations to give effect practically to the right intended to be secured, and if that had not been done, it was solely for Congress to supply the deficiency. They also relied on the ground, that if State laws went further into detail, and made provision for a course of proceeding beyond that indicated by the act of Congress, it might tend to interfere therewith, and that if they prescribed precisely the same modes, they would be merely superfluous and embarrassing. On the contrary, some of the judges were of opinion, that the State Legislature might make laws on the subject, provided only that they should in no way impede or hinder the proceedings under the law of Congress. These, it is believed, are the principal differences in the opinions of the different judges. They all concur in the construction of the Constitution, as intended to secure the right of a slave owner, to regain the custody of a slave who has escaped from service, — in the right of the master, to reclaim him in other States, — in the constitutionality of the law of Congress, — and the nullity and invalidity of any and every State law, which would impair the right, or impede or interfere with the provisions of the act of Congress, providing for a summary proceeding before a judge or magistrate.

Mr. Justice Baldwin concurred in the judgment of the Court, but dissented from the principles laid down by the Court as the grounds of their opinion, but stated none of his own. He had, however, previously expressed an opinion that the act was constitutional on the circuit, in the case of *Johnson* v. *Tompkins*, (Bald. Rep. 571.) This case appears to us to be authoritative and decisive.

We have thought it important thus to inquire into the validity and constitutionality of the act of 1793, because it appears to be decisive of that in question. In the only particular in which the constitutionality of the act of Congress of Sept. 1850, is now called in question, that of 1793 was obnoxious to the same objection, that of authorizing a summary proceeding before officers and magistrates not qualified under the Constitution to exercise the judicial powers of the General Government. Congress may have

thought it necessary to change the pre-existing law, not in principle but in detail, because, as we have seen in Prigg's case, some of the judges were of opinion that State magistrates could not act under the authority conferred on them by the act of 1793, when prohibited from doing so by the laws of their own State, and some States had in fact passed such prohibitory laws.

The present fugitive slave law may vary in other respects, and provide other and more rigorous means for carrying its provisions into effect, but these are not made grounds of objection to its constitutionality.

We do not mean to say that this Court will in no case issue a writ of *habeas corpus* to bring in a party held under color of process from the Courts of the United Sates, or persons whose services, and the custody of whose persons are claimed under authority derived from the laws of the United States. This is constantly done, in cases of soldiers and sailors, held by military and naval officers, under enlistments complained of, as illegal and void. But it is manifest that this ought to be done only in a clear case, and in cases where it is necessary to the security of personal liberty from illegal restraint.

It seems to us to be the less necessary to call into action the powers of the State Judiciary, in a case like this, because it is quite competent to the Judges of the United States Courts, to bring the petitioner before them by *habeas corpus*, and ascertain whether he is detained by an illegal and colorable authority of an officer, claiming to act under the laws of the United States. This consideration is, perhaps, of no other importance, than as showing that there is no necessary occasion for drawing the authority of the State and the United States Judiciary into conflict with each other. Such a conflict can hardly arise, although it may often seem inpending; because it must generally appear, upon a cool and deliberate examination of all the facts and circumstances, whether a subject to which a law of Congress relates, is or is not within the jurisdiction of the general government; if it be so, it is conclusive. All judges of all Courts are obliged to act on the same principles, and be governed by the same rules of duty; they are bound alike by oath to support the Constitution of the United States, which declares that the Constitution itself, and all laws made pursuant to it, shall be the supreme law of the land.

On the whole, we consider that the question raised by the petitioner, and discussed in the argument before us, is settled by a course of legal decisions which we are bound to respect, and which we regard as binding and conclusive upon this Court.

Since the argument in Court, this morning, I am reminded by one of the counsel for the petitioner, that the law in question ought to be regarded as unconstitutional, because it makes no provision for a trial by jury. We think that this could not have varied the result. The law of 1850 stands, in this respect, precisely on the same ground with that of 1793, and the same grounds of argument which tend to show the unconstitutionalty of the one, apply with equal force to the other; and the same answer must be made to them.

The principle of adhering to judicial precedent, especially that of the Supreme Court of the United States, in a case depending upon the constitution and laws of the United States, and thus placed within their special and final jurisdiction, is absolutely necessary to the peace, union, and harmonious action of the State and General Governments. The preservation of both, with their full and entire powers, each in its proper sphere, was regarded by the framers of the Constitution, and has ever since been regarded as essential to the peace, order, and prosperity of all the United States.

If this were a new question, now for the first time presented, we should desire to pause and take time for consideration. But though this act, the construction of which is now drawn in question, is recent, and this point, in the form in which it is now stated, is new, yet the solution of the question depends upon reasons and judicial decisions, upon legal principles and a long course of practice, which are familiar, and which have often been the subject of discussion and deliberation.

Considering, therefore, the nature of the subject, the urgent necessity for a speedy and prompt decision, we have not thought it expedient to delay the judgment. I have therefore to state, in behalf of the Court, under the weighty responsibility which rests upon us, and as the unanimous opinion of the Court, that the writ of *habeas corpus*, prayed for, cannot be granted." [1]

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[1] To this opinion of the Court, as published in the newspapers, was appended a learned note of considerable length, for which we have not room. Most, if not all, of the cases cited therein, are found in *Comm.* v. *Aves.* 7, 18 Pick. 193.

Abstracts of Recent American Decisions.

Notes of Cases decided in the Supreme Court of Massachusetts for the County of Suffolk. — March Term, 1851.

Action — Landlord and Tenant — Forcible Entry and Detainer — Trespass Quare Clausum, and for Assault and Battery. The defendant by written lease demised the premises to one Gates. The lease contained a covenant by the lessee not to underlet, but no condition that the lease should be void for that cause. Gates underlet the premises to Eldredge, he to Hatstatt & Co., who assigned all their interest to Staniels, who gave permission to the plaintiff to remain in possession, paying rent to him. The defendant sued out a landlord and tenant process from the Justice's Court in Boston, to recover possession of the premises against the lessee in the lease and all the under-tenants including the plaintiff; but the latter making defence, a discontinuance was entered as to him, and judgment taken against the rest. On this judgment, execution issued, and was placed in the hands of an officer, who by virtue of it, and under the direction of the defendant, after notice to the plaintiff to quit the premises, removed the plaintiff and his goods from the premises, and placed the defendant in possession, using no more force against the plaintiff than was necessary to remove him. *Held*, that the action could not be maintained. — *Hatstatt* v. *Packard*.

Action — Liability of Owners of Ferry Boats. Action on the case to recover the value of the plaintiff's horse and goods lost overboard from the the defendants' ferry boat. The plaintiff paid his fare, and drove his horse and wagon, loaded with merchandise, on board the defendants' boat, as in ordinary cases. He did not deliver them into the control and possession of the defendants, but retained them under his own. The horse was not used to the ferry-boat, and becoming frightened by the ringing of the engine bell, sprang forward against the chain across the end of the boat, which gave way, and he went overboard with the wagon and merchandise, and the whole was lost. It appeared that the chain was not of so great strength as it should have been; and that the plaintiff left his horse by himself on the boat, and that he was without any one to take care of him when the accident happened. *Held*, that the plaintiff could not recover — the liability of the defendants as the owners of a ferry-boat is not like that of common carriers, unless they take the property carried under their exclusive control; but their liability is rather like that of the owners of a toll-bridge, and they will not be liable for a loss to a traveller unless it arises from their fault while he is in the exercise of ordinary care. In this case, though the defendants were in fault in not having a sufficient chain, the plaintiff cannot recover, because he was not himself in the exercise of ordinary care when the accident happened to his property. — *White* v. *Winnissimmet Company*.

Assumpsit — Deed — Statute of Frauds. The original action was assumpsit brought by Brown against Pike. Brown conveyed land to Pike subject to a mortgage, to secure a note of Brown's, and the deed recited that the amount of the mortgage debt was part of the consideration named in the deed, and that Pike assumed the payment of the same. Pike entered into possession of the premises, but did not pay off the mortgage when it became due. Brown paid the amount to the holder of the mortgage, and then brought this suit to recover the same of Pike. Before suit entry had been made on the mortgage to foreclose. *Held*, that assumpsit was the proper form of action in such case; that such provision in a deed poll, accepted by the grantee, constituted a promise on his part, and not a covenant, and that the case was not within the statute of frauds. — *Pike in rev.* v. *Brown.*

Covenant — Deed — Delivery. Covenant on a bond to convey land in Illinois, dated Aug. 22, 1844. "Said conveyance to be made before the first day of January next." The deed was made by the defendant, and recorded before the first of January, 1845, and was inclosed by him in a letter to the plaintiff, dated Jan. 5, 1845, which was not received until February. It was testified by the subscribing witness to the bond in suit, that it was understood by the parties, that the defendant was to get the deed recorded, and afterwards send it to the plaintiff, in Boston, so that he should get it before Jan. 1, 1845. *Held*, that the delivery of the deed by the defendant, to the register of deeds, at the request of the plaintiff, was a delivery to the plaintiff, and a full performance of his covenant; and that if there was a parol agreement by the defendant, to send the deed to the plaintiff, so that he should receive it before the first of January, such act was not necessary to complete the delivery of the deed; it was a separate and collateral agreement, and its violation not a breach of the covenant. — *Shaw* v. *Hayward.*

Covenant Broken. The action was upon a covenant in a lease, purporting in the body of it to have been executed by the parties to this suit, signed by the defendant, and "J. Hammond, for B. B. Mussey," and a seal. *Held*, that the lease was well declared on as the deed of Mussey. — *Mussey* v. *Scott.*

Deed — Construction. Writs of right, by children and grand-children of Nathaniel Saltonstall. The demanded premises were flats, and owned by Nathaniel Saltonstall, 21 Dec., 1771, when he conveyed to Caleb Loring, by deed of warranty, "A certain piece of land, situate at the lower end of King street, so called, in Boston aforesaid, on the south side thereof; bounded northerly on said street, there measuring thirteen feet six inches; *easterly on the sea or flats;* southerly, or in the rear, on lands or flats, now or late of Mr. Peck; and westerly on the ware-house and land of me, the said Nathaniel Saltonstall; measuring in depth, from front to rear, forty-eight feet, be said measures little more or less, or however otherwise bounded; together with the buildings on said land, with all the privileges and appurtenances thereunto belonging."

Demandants offered in evidence, to aid the construction of the deed,

leases before made, of the store let, described in the deed, in which it is bounded easterly upon the sea or flats, belonging to "the lessor." *Held*, that the deed from Nathaniel Saltonstall, to Caleb Loring, passed the title to the flats claimed in these suits; the words, "on the sea," carrying the boundary to low water mark, though the words, "on the flats," mean high water mark, for the reason that a grant is to be taken most strongly against the grantor. *Also*, that the leases, if admitted, would not affect the construction, as the flats might well be omitted in the lease, though included in the deed; they would not constitute a severance of the flats from the estate. — *Saltonstall* v. *Proprietors Boston Pier, or Long Wharf.*

Devise — Construction — Partition. Writ of right. Joshua Cheever, by will proved Jan. 5, 1813, devised the demanded premises and other property to his children, in unequal shares, "the shares to be in fee simple, excepting my son Joshua's share, which he is to have for his natural life; and after his death I do give the same to such of his children as may survive him. Said gift to my son Joshua, to be subject to the power hereinafter given to my executors, relative to the same." The power referred to, was to sell the share of Joshua, if he should become necessitous, and apply the proceeds to his support; which power was never executed. The will also provided that advancements made by the testator to his daughters, should be considered in making the division. Joshua, the son, died intestate, in 1816. William, his son, died intestate, in 1826, leaving the demandants his children, who were born respectively, July 27, 1822, and Oct. 20, 1824. March 28, 1814, a paper, purporting to be a partition of the testator's lands, was filed in the Probate Office, but was not approved by the judge of probate, until after the commencement of this suit, under which alleged partition the tenants claimed. This suit was commenced within five years after the demandants obtained their majority. It was not disputed that the demandants were entitled to the portion demanded, if to any. *Held*, that the devise to Joshua, the son, created a contingent remainder, contingent upon his children's living at his death, and upon the execution of the power by the executors, and that no partition of such contingent remainder could affect any person beyond the first taker: *Held*, also, that the partition was irregular, in not taking into consideration the advancements to the testator's daughters, and not having been accepted by the judge of probate, until after the commencement of this action, and then without notice. — *Cheever et al.* v. *Fenno.*

Domicil — Insolvent Debtor. Petition to stay proceedings in insolvency against William D. Leavitt, and John McDaniel. Leavitt and McDaniel were partners, carrying on business in New Hampshire, till Sept. or Oct., 1849, when they gave up business, and Leavitt, with his family, came to Lynn, in this State, but in Dec. 1849, left and went to St. Louis, Mo., and has not since returned. His wife went to Lowell, where she has since remained. McDaniel had never left New Hampshire when the proceedings in insolvency were commenced in Essex county, in Jan. 1850. The petitioner, their creditor, attached their property in this State, on a writ returnable to the Court of Common Pleas, at the Jan. Term, 1850.

Held, that Leavitt, by leaving New Hampshire with the intention of not returning there, acquired a domicil at Lynn, which was not changed by the subsequent removal of his wife to Lowell; that the proceedings were properly instituted in Essex county; that the fact that one of the partners resided out of the State, cannot prevent proceedings against his co-partner here; and that the assignment would apply to all the property within the reach of the assignee, it being sufficient for the purpose of deciding the present case, that there was joint property in this State, and proceedings regularly instituted against the partners jointly. Whether the assignee can go into another State to reach property there, *quære*. See Stat. 1838, c. 163, § 19, 1814; c. 178, § 13. Petition dismissed. — *McDaniel, Petitioner for Mandamus*, v. *King, Commissioner*.

Equity — Specific Performance — Executor's Bond. Bill to enforce specific performance of a sale of real estate, made by the complainants as executors under license of the Probate Court. The respondents demurred to the bill, and the objection raised was to the sufficiency of the bond of the executors. By their bond they bound themselves jointly and severally in the sum of $60,000, with two sureties, each in the sum of $30,000. This bond was in the sum ordered and formally accepted by the judge of probate. *Held*, that the bond was not a nullity; that it was binding on the obligors, and gave efficacy to their acts as executors; though it would be better in such cases that the sureties be each bound in the same sum as his principal. Specific performance decreed. — *Baldwin* v. *Standish*.

Equity — Jurisdiction. Bill in equity to set aside conveyances alleged to have been made in contemplation of insolvency by the grantor, for the purpose of giving a preference to the respondents, who were liable as indorsers for him. The bill contained a prayer for a discovery. *Held*, that, though the case strictly arose under the insolvent laws, the Court had not jurisdiction under the 18th section of the statute, 1838, c. 163, as the remedy at law afforded adequate relief; and as the remedy is properly at law, the prayer for a discovery is not sufficient to give jurisdiction, for that may be had in aid of proceedings at law. Bill dismissed without costs and without prejudice. A bill in equity will not lie under the statute 1838, c. 163, s. 18, by the assignee of an insolvent debtor under the insolvent laws, to set aside conveyances made by the debtor before his insolvency, and, in contemplation of it, for the purpose of giving a preference to the grantees, who were liable as indorsers for him, the remedy at law being adequate; and it will make no difference that the bill contains a prayer for a discovery, as that may be had in aid of the proceedings at law. *Woodman, Assignee*, v. *Saltonstall*.

Evidence — Trustees — Set-off. Debt on a judgment recovered in New York. At the trial below, the defendant offered to prove that the suit was brought by the plaintiff for the benefit of one Kemble, the real owner of the judgment, against whom he claimed the benefit of a set-off. *Held*, that the 11th section of the 96th chapter of the revised statutes, allowing defendants in actions brought by trustees to set off debt against the *cestuis*

que trust, is not limited to cases where the fact of such trust appears on the record; but this may be proved: yet the defendant must be confined to matters strictly of set-off, and can set off nothing which goes to the validity of the judgment, on which the action is founded. — *Sheldon* v. *Kendall.*

Evidence — Burden of Proof. Assumpsit to recover the price of butter sold the defendant. The plaintiff admitted that the sale was made on a credit of "30 or 60 days," which latter period had not elapsed when the suit was commenced. *Held*, that the burden was on the plaintiff to show which term of credit was given; that a sale and delivery made a *primâ facie* case for the plaintiff; but that having admitted that the sale was made on a credit, he was bound to show that the credit had expired, in order to recover. — *Morrison* v. *Clark.*

Executors, &c. — Will — Codicil — Powers, &c. Assumpsit on a note given for the purchase-money of land, sold and conveyed by executors under a power in the will of their testator. Defence, — that the persons making the sale had no authority under the will to make it; and that the note was therefore invalid for want of consideration. The testator, by his will, devised his real estate absolutely; and afterwards in the will authorized his *executors therein named* to sell and convey all his real and personal estate, or any part thereof; and appointed three persons executors of his will. Subsequently he made a codicil to his will, by which he revoked the appointment of one of the executors nominated by the will, and appointed another in his stead. The sale and conveyance of the land for which the note in suit was given, was made by the executor nominated by the codicil, and by the two whose appointment by the will was not revoked by the codicil. *Held*, that the execution of the codicil was a republication of the will; that the power was a good and valid authority to the persons who effected the sale of the land, and that the absolute devise of the premises by the will of the testator constituted no objection to the execution of the power. — *Harrington* v. *Rice; Pratt* v. *Same.*

Guaranty. Action on the guaranty of the defendant's testator of the price of goods bought by one Goddard of the plaintiffs. March 26, 1842, the plaintiffs signified to the defendant's testator, A. Brooks, Jr., that they would pay him a commission for his guaranty of Goddard's debt to them and his "future purchases," as they had before talked of. In reply, A. Brooks, Jr., by letter, dated May 5, 1842, stated to plaintiffs that he would guarantee Goddard's indebtedness, present and future, upon the following terms: — "I shall require information from you immediately upon your selling him goods, of the amount sold him at each sale, and of the time of credit. I shall not be holden to pay for them, except in the event of Goddard's failure and inability to pay; in other words, I shall provide no funds to meet his engagements, and shall stand as guarantor of the same, and save you harmless and indemnified from loss by him, in case of ultimate inability in him to pay you; and for such liability I shall charge you 2 1-2 per cent." June 3, 1842,

the plaintiffs gave A. Brooks, Jr., notice that they had credited him with the amount of his commission on $3491.09, "the amount of Goddard's indebtedness to us" to date. The times of sales of goods, and time of credit, was at the same time given, from which was omitted a small bill of $31, by accident; and no mention was made of a money loan to him of $1000. No goods were afterwards sold to Goddard. In June, 1843, after the maturity of all the debts of Goddard to plaintiffs, they took from him his notes for the whole amount on time. *Held*, that the guaranty extended only to the price of goods purchased of the plaintiffs, and not to money loans; that the accidental omission of the bill of $31 in the notice to the guarantee did not effect his liability; nor did the omission of the money loan thereon, that not being embraced in the guaranty; but that the extension of time of payment given by the plaintiffs to Goddard, without the consent of the guarantor or his subsequent ratification of the act, discharged his liability, there being nothing in the case to take it out of the rule by which sureties are discharged by giving time to the principal. — *Chace et al.* v. *Brooks, Ex'or.*

Insolvent Debtors — Certificate of Discharge. Assumpsit to recover the price of a quantity of hay belonging to the plaintiff, but bought by the defendant of A. H. Field, who was at the time doing business in Boston, and who gave a bill of the goods in his own name. Afterwards the defendant obtained his certificate of discharge under the insolvent laws of this State, which he set up in defence to this action. The plaintiff is, and was at the time of the sale of the hay, a citizen and resident of Maine. At the trial below, Field testified that when he sold the hay to the defendant, he informed him that he was selling it on commission for a man living in Maine, but did not state his name. For the defendant it was maintained, that the facts showed that the contract was made and to be performed in this State, and therefore within the operation of the insolvent laws; but the Court *held*, that the certificate was not a bar to the action. — *Ilsley* v. *Merriam.*

Insolvent Law — Foreign Bankrupt. Assumpsit against the acceptors of a bill of exchange, drawn, accepted, and made payable in England, in favor of the plaintiff, who was a citizen of the United States at Boston. Soon after accepting the bill the defendants became bankrupt, and obtained their certificates of discharge under the bankrupt law of England. The plaintiff did not prove his claim in bankruptcy against the defendants. *Held*, that the certificate was a bar to the action.—*May* v. *Breed & others, trustees.*

Mortgage — Foreclosure — Commissions to Mortgagee. Bill to redeem mortgaged real estate. The entry to foreclose under the mortgage, was made before the principal sum secured by it had become due, for the non-payment of interest, according to the condition of the mortgage. The bill was filed, but a decree had not been pronounced before the principal debt had become due. *Held*, that in order to redeem, the mortgagor must pay the whole amount due on the mortgage, when the decree is pronounced, and not merely what was due at the time of filing the bill; in this case, the whole amount of principal and interest secured by the mortgage. Rev.

Sts. c. 107, § 14 - 23. *Held*, also, that the decision of the master to whom the case is referred to state and report the account between the parties, in respect to the allowance to the mortgagee, or his assignee, in possession of the premises for repairs and improvements to the same, is conclusive, unless a mistake clearly appears. *Held*, also, that a commission of more than five per cent. may be allowed to the mortgagee, as compensation for his care of the premises, where it appears that that is insufficient. No fixed rule has been laid down upon this subject, and none can be; each case must depend upon its own merits. — *Adams* v. *Brown*.

Officer — Power to Arrest — Trespass. The defendant, being a constable in the city of Boston, and being informed by one Clements, that the plaintiff had goods in his possession, which were stolen from him, went to the office of the plaintiff, and, finding some of the goods, arrested the plaintiff without a warrant, and confined him in jail until the next morning, when the Police Court refused a warrant to arrest him as a receiver of stolen goods, knowing them to be such, and he was released. The trial below resulted in a verdict for the plaintiff. *Held*, that the proper instruction to the jury was, that the defendant was justified, if they were satisfied upon the evidence, that, at the time of the arrest and imprisonment, he had reasonable ground to suspect the plaintiff of receiving stolen goods, knowing them to be stolen, and made the arrest, acting as a peace officer, and in such belief, to secure him until a suitable opportunity for obtaining a warrant, — excluding the position that it was necessary to show a probable necessity for the arrest, in order to prevent his escape, or the concealment of the goods, as laid down by the judge, who presided at the trial below. — *Rohan* v. *Sawin*.

Promissory Note — Payment. Assumpsit to recover the amount of an account annexed. The defendant filed in set-off, a note signed by the plaintiff Pray, payable to "Chandler & Maine," for $ 100 on demand. On the back of the note were indorsed, "Chandler & Maine, to Wingate," and "Andrew T. Wingate." The name of Wingate was placed on the note, before it was delivered to Chandler & Maine; and the note was given to secure them for professional services, to be rendered by them for Pray, in proceedings in insolvency, instituted by him. The services were rendered, and amounted to $ 81, which sum Wingate paid to Chandler & Maine, and they delivered the note to him indorsed as aforesaid. Subsequently Wingate transferred the note to the defendant, one of the payees in the note, by delivery. *Held*, that Wingate was joint and several maker of the note with Pray, and that by his payment of the whole amount due thereon to Chandler & Maine, the note was extinguished, and could not afterwards be enforced against Pray, and that the remedy of Wingate was by action against him for money paid on his account, and not on the note. — *Pray* v. *Maine*.

Promissory Note. Assumpsit on a negotiable note by an indorsee against the maker. The defendant made the note for the accommodation of Carley, to whom it was made payable. Carley indorsed the note before

maturity, to Carley & Clapp, Clapp being his partner, and they indorsed the same after maturity, to the plaintiff. *Held*, that the plaintiff could not maintain the action, as he had no better right than Carley & Clapp, and that they could not have maintained a suit on the note against Fuller, as they must stand on the footing of Carley alone who could not sue Fuller on the note. — *Quinn* v. *Fuller.*

Poor Debtor's Oath — Notice — Practice. Debt on a bond for prison limits. The only question in this case was as to the sufficiency of the notice to the creditor, Knights, of the time and place of the debtor's taking the poor debtor's oath. The officer made return of service of the notice on Knights by delivering a copy thereof to Hutchins & Wheeler, his attorneys, who were both his attorneys of record in the suit. The objection was, that a copy should have been served on each of the attorneys. *Held*, that the notice was sufficient; that notice to one attorney was all which the statute required, and that so far as the return shows, the notice might have been served on both attorneys by the officers delivering the copy to one of them, and then taking it back and delivering it to the other. — *Knights* v. *Fifield et al.*

Taxes — Abatement. Complaints for abatement of taxes. Rev. Stat, c. 7, sec. 40, provides that "no person shall have any abatement made by the commissioners, unless he shall have brought in a list of his estate to the assessors, or shall show good cause for not having so done, and unless he shall, if required by the assessors, have made oath to the truth of the same." Under this section, it was held that the exhibition to the assessors by the agent of the Winnissimmet Company of a plan of the Company's lands in Chelsea, was not a compliance with this provision, nor excuse for not giving another list. In the case of Carey, where the assessors went to view his property, he told them the amount and quality of his real estate, and the amount of his personalty, with which the assessors were satisfied. *Held*, that this furnished no sufficient excuse for not furnishing the list, the assessors having no power to waive the express provisions of law, such provisions not being for their benefit. The argument by the Company that they are not a *person*, and therefore could not receive notice, proves too much, as only *persons* by statute can receive back taxes paid in wrong. It seems that publication of notice by the assessors, requiring persons to bring in lists of their estates, as required by sec. 19 of c. 7, Rev. Stat. is not necessary to the obligation of persons to bring in lists of their estates. In this case it did not appear whether such notice had or had not been given by the *assessors.* — *Winnissimmet Co* v. *Inhabitants of Chelsea.*

Vendor and Purchaser — Bill of Sale. Trover. Plaintiff, being assignee in insolvency of the estate of E. Nims & Co., sold personal property of the estate to the defendant, subject to mortgages thereon, and made a bill of sale of the same. The bill of sale commenced, "Inventory of property of E. Nims & Co. F. Bowman bo't of," &c.; then followed a list and description of property under which was written, "subject to mortgages." This bill of sale contained a list of all the personal

property of the estate, some of which was subject to mortgages, and some was not. The defendant took possession of the whole. The plaintiff claiming to have sold to him only that part which was subject to mortgage, brought this action to recover the residue. At the trial it appeared that the parties for the purpose of executing the bill of sale took the inventory of the property to a lawyer, who inserted therein the words, "F. Bowman bo't," &c., and "subject to mortgages," and that this was then executed as a bill of sale. *Held*, that there was no ambiguity in the bill of sale; that it passed to the defendant the title to all the property described therein, and that parol evidence was inadmissible to explain or control it. — *Ridgway, assignee*, v. *Bowman*.

Way — Defect — Damages. The plaintiff, in attempting to cross a street in Lowell, from the side-walk, fell, and severely injured his knee, and for this injury this action was brought. The plaintiff fell at or near an iron grating, placed without being fastened, over a hole by the side-walk, through which water passed from the street, the grating extending up against the curb-stone, and at the time of the accident, being an inch or an inch and a half above the side-walk. It was contended for the city that they were not, in law, bound to keep this portion of the street, between the carriage-way and side-walk, in such repair, that foot passengers may safely cross at all places; and offered evidence of sufficient crossings in the street. The trial resulted in a verdict for the plaintiff, in the sum of $9,975. *Held*, that it is the right of foot passengers to cross the carriage-way of streets at any place, and that they are not limited to the crossings; though they may be bound to use greater care in crossing at other places; that the defendants are bound to keep all portions of their streets in good repair, though it does not follow from this that they are bound to keep all parts in equally good repair. *Held*, also, that the evidence did not show such culpable negligence on the part of the defendants, as to render them liable for the injury to the plaintiff, and that the plaintiff was bound to show affirmatively ordinary care on his part, to entitle him to recover, which he had not done in this case. *Held*, also, that the damages were excessive, and that the Court would be inclined to set aside the verdict for this cause, if there were no other. — *Raymond* v. *City of Lowell*.

Way — Discontinuance. Petition for damages, for injury to petitioner's land, caused by discontinuing a portion of Market street, in Boston. None of the land of the petitioner abutted on the part of the street discontinued, though accessible through it. *Held*, that the petitioner was not entitled to recover. To entitle a person to damages in such case, it must be for an injury done to some estate bounded on the highway discontinued, or so connected with it, that the open way is *necessary* to the estate; but that it is not intended by this decision to lay down the general rule, that damages can in no case be recovered where the estate does not bound on the discontinued road; there may be cases where it is otherwise, as where the whole access to the estate is thereby destroyed — *Smith* v. *City of Boston*.

Miscellaneous Intelligence.

JUDICIAL AND OFFICIAL CHANGES. — Robert J. Brent, Esq., has been appointed by Governor Lowe, Attorney General of Maryland, to succeed the Hon. G. R. Richardson, deceased. Hon. Cornelius Darragh, Attorney General of Pennsylvania, has resigned. Hon. George Chambers, of Franklin Co., Pennsylvania, has been appointed an associate Judge of the Supreme Court of Pennsylvania, in place of Judge Burnside, deceased. Judge Greene C. Brownson has resigned the office of Judge of the Court of Appeals of New York. George W. Morton is appointed Clerk of the District, and John W. Nelson, Clerk of the Circuit Court of the United States for the Southern District of New York. Stephen H. Phillips, of Salem, has been appointed District-Attorney for the Eastern District of Massachusetts, *vice* A. Huntington, resigned; Horatio Pratt, of Taunton, for the Southern District, *vice* H. G. O. Colby removed, and A. W. Farr, of Lowell for the Northern District, *vice* Charles R. Train removed. The Hon. Ward Chipman has recently retired from the office of Chief Justice of the Province of New Brunswick, after sixteen years of service. The members of the Bar waited upon him at his residence, and presented an address, in which they say: — "They believe they but express the opinion of the people of the Province, when they say that the administration of justice, under your guidance, has been distinguished by a strict adherence to the Law, and the most undeviating impartiality. The language of flattery it would be unbecoming in us to offer, and unworthy of yourself to receive; but the Reports of the Supreme Court for the last sixteen years afford, in language which no man can pervert, and which all may read, enduring records of the vigorous application of your mind, and the sound conclusions of your judgment, upon the various questions of rights and property, which conflicting interests have brought before that tribunal for adjudication; and in the calm seclusion of private life to which you have now retired, it must be a source of gratification to reflect, that your decisions are cited and referred to as authorities, in the Courts of the United States and the adjoining Colonies, in cases of a similar character." To which his Honor replied in the following speech — which is a model of beauty and brevity:

"Gentlemen — It is impossible for me to receive this Address without deep emotion. It is indeed most gratifying to me to be assured, that I retire from public life with the esteem and good opinion of those among whom that public life has been passed.

"With regard to the decisions of the Supreme Court to which you allude, it must be remembered that a full share of any merit they may possess is owing to the hearty and most efficient co-operation of my brethren on the Bench. Gentlemen — I bid you farewell with the most sincere wishes for your prosperity and happiness."

CONTEMPT OF COURT. — At San Francisco, latterly, great fault has been found by the press with the results as well as the manner, of the administration of justice by the Courts. Judge Levi Parsons, of the Fourth District Court in that city, in his charge to the Grand Jury, suggested the propriety of inquiring into the conduct of the press, and if it had transcended certain limits, of presenting it as a nuisance. Among other papers, the Herald commented upon the charge in an article headed "The Press a nuisance." Judge Parsons deeming the article a contempt of Court, summoned the Editor to appear and answer for a contempt. He appeared, defended himself by counsel, was sentenced to pay a fine of $500, and to solitary confinement

until paid. The Editor refused to pay; was taken into the custody of the sheriff, and subsequently was carried by *habeas corpus* before the Superior Court, and was there discharged. While the editor was in custody, the people had a mass meeting, denounced the Judge, and threatened to take the prisoner from the officer — but were persuaded to await the decision upon the *habeas*. The matter has been carried into the Legislature, and a committee has reported in favor of the impeachment of the Judge.

A correspondent of the Journal of Commerce has given a specimen of a trial in California, as follows, to wit: — Question in dispute, a "jumped claim." Scene — Washington, a village high up on the South Yuba. Court-room, a "round tent" or gambling shop owned by the Alcalde, whom, behold at a monte table, behind which he sits in all the dignity of office, wearing the only coat to be found in the place.

In pleading, the defendant "put himself upon the miners," instead of "upon the country," and then remarked, that "the papers in his hand had been drawn up with a view to test the ability and honesty of the Court, who is well known to be in the round tent interest." He then required the plaintiff to enter security for costs of suit, and when the other had done this, demanding the same of him, he refused, coolly remarking "that he never intended to pay costs or abide the Court's judgment, but should appeal to the miners in mass meeting." The plaintiff at once withdrew the suit, avowing his purpose to settle upon the claim and defend it with his rifle. The defendant thereupon joined issue — "he would do the like," and they were about leaving the round tent, when the Alcalde rose from his monte table and indignantly burst forth. His speech was filled with expletives and left-handed blessings, to which I dare not attempt to do justice. It was only an hour's length, but consisted of a few topics upon which the changes were fiercely rung. He prefaced all by pulling off his coat. As near as I can recollect the body of his speech was this: — "Gentlemen! hold on a bit till I get through, and then we'll take a tot together. I can't help speaking to you now, 'cause that dirty old coyote of a defendant has attacked my honor. I meant to keep still until the trial was over, but now, since they've quit that and are going to work at the game that 'the longest pole knocks off the persimmon,' I'm bound to tell that defendant that I don't know him, don't want to know him, don't *keer* for him, don't *fear* him, and swear I'll flog him. Gentlemen, this is the first time my honor was ever attacked since you elected me Alcalde. If ever I try another case, I'll try it with a revolver on the table, and if any man insults me, he shall receive the *contents* of *it*. Gentlemen, I stand in Californy on my own footing as a man, and on the responsibility of the miners as an Alcalde. I come from old Varginny, a poor boy, and went to Mazoura, where I should have been poor all my life, if I hadn't married a girl with a powerful smart sprinklin' of money. Then I used to lay off in the shade with my babies, *and it was her heart's delight to see me do it.*

"I come out to Californy to replace them dimes, and when a man assails my reputation, he assails the reputation of a man of family, who hev family duties to mind. I left a wife and two innocent babies in Mazoura, and it would be *mean* for me to come out here and do anything dishonorable. Gentlemen, the defendant hev huv out some insinuations against my character! If he'd done anything else I wouldn't keer, but when my honor is attacted — I'd rather die — oh-h-h! (Here the Alcalde had a choking spasm of some length, and then proceeded with clenched fists.) Gentlemen, I'm the littlest man on the river, but I've got a heart as big as a round-tent! That's why they elected me Alcalde, because I was a little man and had a heart big enough to do justice to round-tent men and miners both. Since I've been Alcalde, I've always given 'em the right sort of justice, and as long as I am Alcalde, I mean to give 'em just what sort of justice suits me best. I'm no lawyer and don't know any kind of law but common law. And every body knows that is nothing but common sense and justice, as we practyse it in Californy. Now, gentlemen, I want you to see if I don't give that defendant justice accordin' to the common law of these diggings. (Here the

monte table shook under an emphatic whack of his fist, and the ink was scattered over the records of the court.) Now the ink and the pen and the papers and the defendant all go to —— together!"

He thereupon leaped upon the defendant, and proceeded to administer "the common law of California" in the most superb style. When this operation was finished, and the defendant kicked out of the seat of justice — *videlicet*, the round-tent — the Alcalde turned to the crowd and politely remarked,

"Gentlemen, allow me to express my obligations to you for your presence and the attention you have shown me during this trying ceremony. Toddle up, all of you, and take a tot. Then, I can beat any man in the crowd at seven-up with an ounce for the first Jack!"

A PLAIN-SPOKEN JUDGE. — In a recent trial for murder in Pittsburg, the jury brought in the defendant, James Kelley, guilty of murder in the second degree. The presiding judge did not like this, and when he came to sentence him, addressed the prisoner as follows. "You, James Kelley, well merit the gallows, and that you have not got it is no fault of mine. I charged the jury very pointedly, that you were guilty of murder in the *first* degree. The blood that will hereafter be shed on account of the verdict of the jury by whom you were tried, will not be upon my skirts; had I charged otherwise, I would have considered that I might as well have let a wild tiger loose in the streets, or placed a rattlesnake under the pillow of an infant! There is no doubt of your atrocious guilt in the fiendish and diabolical murder of John Cox. You stand before this Court, spotted all over with the crime of wilful murder — unparalleled in the annals of crime, and instead of passing a sentence consigning you to a cell in the penitentiary, we should at this time be passing the sentence of death upon you — you richly deserve it!"

The judge seems to think as lightly of hanging a man as the Dutch captain did of having one killed. The story goes — that an English ship of war saluting a Dutchman, accidentally fired a shotted gun. The English captain instantly ordered his gig, went on board the Dutch vessel, and explained the cause of the accident, adding in conclusion, "and the man whose carelessness has caused the disaster, shall be hung at the yard arm as soon as he is discovered. "No, *no*, no," exclaimed the Dutchman, "it ish enoff now, de abology ish enoff — blaänty; let de poor devil go; dere ish blaänty more Dootchmen's in Holland, blaänty!" A different estimation was put on human life in good old Saxon times, for we are told in Horne's Mirrour, that King Alfred "hanged Freburne because he judged Harpin to die, whereas the jury were in doubt of their verdict, for in doubtful cases one ought rather to save than to condemn." It was dangerous being a judge at that time, for the names of forty-four justices are given, and their offences specified, "whom King Alfred caused to be hanged in one year, as murderers, for their false judgments."

LAW REFORM IN MASSACHUSETTS. — The last number of the Reporter contained a nearly correct copy of the act reported by the Commissioners appointed to revise and reform the proceedings in the Courts of Justice in this Commonwealth. This act was referred to a joint committee, consisting of the two Judiciary Committees of the Senate and House, who reported back the bill referred to them, modified in various details, and changed in principle in the two following particulars; *first*, that it is not judicious to recommend the administration of oaths in the various stages of pleading, either to the parties or their counsel, as was contemplated throughout the commissioners' bill; and *second*, that the repeated returns of process recommended in the commissioners' bill, should not be introduced immediately into the country Counties. The bill reported by the committee passed to its third reading in the House on the sixth of May, by a vote of 164 in favor to *none* against.

New Hampshire Constitutional Convention. — The readers of the Reporter are aware how much labor was lost at the constitutional convention in New Hampshire, from the fact that the people concluded on the whole to let well enough and the fifteen distinct questions submitted to them, alone, and go on under the old Constitution. Not discouraged, however, the members of the convention met again at Concord on the 16th April, according to adjournment, and voted to re-submit three of the questions, viz., the abolition of religious tests and property qualifications, and the future mode of amending the Constitution to the people. The convention was in session but two days. The whole appropriation was used up so clean, that but $46 was left out of the $40,000 appropriated.

English Intelligence. — Lord Langdale, late master of the rolls, took leave of the bar practising in the Roll's Court on the 24th March. The bar expressed "their sincere regret at the retirement of a judge, who is equally distinguished by legal erudition and moral dignity." Lord Langdale replied, "at a cooler moment a close inspection of the reports of his decisions will show how greatly he has been assisted by the industry and integrity of the bar." Sir John Romilly was sworn in as the successor of Lord Langdale on the 28th March. Sir George James Turner, has been appointed Vice Chancellor in place of Sir James Wigram, resigned. Sir Alexander J. E. Cockburn is promoted to the office of Attorney-general, vice Sir John Romilly; and is succeeded as solicitor-general by Sir Wm. Page Wood. A new vice-chancellorship has been established. It will be recollected that in 1841, provision was made for abolishing the office of the third chancellor so soon as it became vacant, but the press of business in that Court has made it necessary to restore the office. On the 27th March, Lord John Russell had leave to introduce into the House of Commons the long talked of bill for the better administration of justice in the Court of Chancery. The bill proposes "that a Court should be established, to be called the Supreme Court in Chancery, or the Lord Chancellor's Court; and in that Court should sit, the Lord Chancellor, the Master of the Rolls, and one of the judges of the Courts of law, to be summoned from time to time for that purpose." The present state of business in the Common Law Courts is such, that it will not be difficult for those Courts to lend the assistance of one judge for the performance of the duty in question. Any of the two judges of the Supreme Court shall have all the power and authority of the Court of Chancery which the Lord Chancellor now possesses. Thus the Lord Chancellor will not be so entirely absorbed in the discharge of his individual duties as not to have time for the discharge of the other important functions which he will be called upon to exercise. Another object of the bill is to transfer the ecclesiastical patronage hitherto exercised by the chancellor to the treasury. The question of salary was also considered. The committee on salaries of last season had proposed £8000. The bill names £10,000, and the retiring pension £5000. The bill is considered a compromise between the plan of Lord Langdale, proposed in 1836, and that of Sir Edward Sugden; adverse criticisms were made to the bill at the time of its introduction by some of the legal members of the House. Other projects of legal reform were promised by Lord John Russell. — The County Courts Extension Bill, the favorite project of Lord Brougham, has met with unexpected opposition in the House of Lords, from Lord Truro, the chancellor, and Lord Cranworth, (Vice-Chancellor Rolfe.) — The Prohibited Affinity Marriage Bill was lost in the House of Lords on its second reading, by a vote of 50 to 16. The chief opposition came from the bishops — Lord Campbell was with them.

It is known to most of our readers that a Society has lately been established in England, to promote the amendment of the law. It numbers among its members names known to the profession on this side of the Atlantic. The consideration of the policy of the distinction between law and equity procedure was referred to a special committee, who have made a report which has been printed. We have been favored with a copy, and hope to find room in the next number for an extended notice of it.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF NEW BRUNSWICK, WITH TABLES OF THE NAMES OF THE CASES AND THE PRINCIPAL MATTERS. By JOHN CAMPBELL ALLEN, Esquire, Barrister at Law. Vol. I, containing the cases from Easter term in the eleventh year, to Easter term in the thirteenth year of Queen Victoria, both inclusive. St. John, N. B. Printed by William L. Avery: Brunswick Press, Prince William street, 1850.

The present volume of Reports was commenced by DAVID S. KERR, Esquire, as the fourth volume of his reports, and the cases of Easter term, 1848, and the principal part of those of the following term, were published by him previous to his resignation of the office of reporter. At his request, those cases were included in this volume.

During the period comprised in these reports, the bench of the Supreme Court of New Brunswick was occupied by the late venerable Mr. Chief Justice CHIPMAN, and Justices CARTER, PARKER, and STREET. All the members of the Court were gentlemen of learning and wisdom; and the decisions emanating from such a tribunal are well worthy of respect. We are happy to be able to add that the reporter has performed his task in such a manner as greatly to increase their value.

A great number of points are considered in this volume. Among them are the following: In *Rector* &c., of *Hampton* v. *Titus*, (p. 278,) it is *held*, that if a tenant cuts down trees for the purpose of clearing wilderness land, they belong to him, and the cutting is not waste; but the *onus* lies on him to show that they were cut for that purpose; and it was the further opinion of a majority of the Court, that the tenant should show that such trees were cut with the present intention of clearing the land. But it was held by STREET, J., that if the tenant intended to clear the land at any time during the term, it was not waste. In *Magee* v. *Street*, (p. 242,) the much vexed question of warranty arose, or rather of false representation arose. The plaintiff purchased from the defendant, a commission merchant, soap which he had on consignment and represented to the plaintiff to be "*Glasgow* pale yellow soap," a well-known and superior article; neither party examined the soap before the sale, but on examination a few days after, it proved to be useless, of which the plaintiff immediately notified the defendant, and requested him to take it back: *Held* that the defendant was liable, though since his information from the consignors he might have believed the article substantially agreed with his representation; and that the plaintiff was entitled to recover the whole price, though the defendant had remitted the proceeds to the consignors before receiving the notice. It was also held that the delivery of a bill of parcels after the sale, on which a receipt was given for the price, did not exclude parol evidence of the representation as to quality. We hardly think that such is understood to be the law in Massachusetts. In *McGhie* v. *Gilbert*, (p. 235,) it is decided that the authority of an agent specially authorized to draw a

bill of exchange for a particular purpose, ceases on the acceptance, and if the drawer is discharged by want of notice of dishonor, the agent cannot, without further express authority, revive the liability by agreeing to waive the legal discharge.

On the whole, we can most cheerfully welcome this first volume of "Allen's Reports," as the commencement of a series, which is likely to prove a valuable accession to the libraries of American lawyers.

Obituary Notice.

Died, at Topsham, Me., March 24, 1851, Benjamin Hasey, Esq., aged 79.

Mr. Hasey was born in Lebanon, Maine, July 5, 1771. His father was the Rev. Isaac Hasey, the minister of that town, a native of Cambridge, Massachusetts, and a graduate of Havard College in the class of 1762, as was also his uncle Benjamin Hasey, in the class of 1771. His mother was a daugher of William Owen of Boston. Mr. Hasey received his preliminary education at Dummer Academy under the celebrated master Moody, entered Havard College in 1786, and graduated in 1790. Among his classmates were Governor Crafts of Vermont, the Hon. Josiah Quincy, and the late Rev. Mr. Marrett of Standish. Soon after leaving College, he entered the office of the late Judge Thacher of Biddeford, was admitted to practice in April, 1794, and in June of the same year established himself at Topsham, where he for nearly fifty-seven years continued to reside.

Mr. Hasey represented his town in the legislature of Massachusetts several years prior to the separation of Maine, but not being fond of the strife of politics, he withdrew from all public employment. Reserved and retired in his habits, he lived a bachelor. He was a man of rigid integrity, regular and steady in all his modes of thought and action. Strongly conservative in his spirit, change was distasteful to him. For more than thirty-eight years he boarded in the same family, and for many years occupied the same office, to which he daily resorted, until within a few days of his death, as in the time of his full practice. As a counsellor, his opinions were sound and much valued, and for many years he had an extensive practice in the counties of Lincoln and Cumberland. He rarely, however, appeared at the bar as an advocate; his natural diffidence and reserve disqualifying him for any display. Many years since he left the active duties of the profession. The innovations which of late years have been constantly taking place in the manners and course of practice at the bar, were ill-suited to his conservative feelings. The want of ancient decorum and respect, the absence of forensic courtesy, fretted upon his nerves. The abolishing of special pleading annoyed him, and the adoption of the Revised Statutes so thoroughly confused his ancient notions of the law, that it drove him from the practice. Codification in any shape he could not endure; it displaced his accustomed authorities, and cast him afloat in his old age on what seemed almost a new profession. He lived in the past, and believed in it, and strove as much as mortal could to keep himself from the degeneracy of modern ideas.

Mr. Hasey was at the time of his death the oldest surviving lawyer in Maine. The whole number of lawyers in the State when he commenced

practice, was but 17; of these, the only one now alive is Judge Wilde of Massachusetts, who, graduating at Dartmouth College in 1789, opened an office at Waldoboro' in 1793, and afterwards moved to Hallowell, where he was the leader of the bar untill his appointment as judge of the Supreme Court of Massachusetts in 1815, from which he has just retired full of years and honors. All the other of Mr. Hasey's early contemporaries have gone to their account. Among them were many distinguished names, in their day, although the fame of most of them has passed into the shadow, which envelopes the retreating masses of mankind. There were Timothy Langdon, Silas Lee and Manasseh Smith at Wiscasset, George Thacher, member of Congress and judge of the Supreme Court of Massachusetts, and Prentiss Mellen, first chief justice of Maine, at Biddeford; Dudley Hubbard, at Berwick, Isaac Parker, late chief justice of Massachusetts, at Castine, Joseph Thomas at Kennebunk, Wm. Lithgow, U. S. district attorney at Georgetown, James Bridge, at Hallowell, John Frothingham, Daniel Davis, afterwards solicitor-general, and Wm. Symmes at Portland.

Of the other members of the bar in Maine, forty-one in number, including those before mentioned, who were established there prior to the commencement of the present century, four only remain. *Thomas Rice*, a graduate of Havard College in 1791, settled in Winslow in 1795, where he now resides, enjoying a quiet and happy old age; *Samuel Thacher*, a graduate of Havard College in 1793, settled in New Gloucester 1798, afterwards in Warren, and now living in Bangor; — for many years an active politician, often in the legislature of Massachusetts and Maine, and a member of Congress; *Jeremiah Bailey*, a graduate of Brown University in 1794, who opened an office in Wiscasset in 1798, where he has ever since resided, filling many important stations, enjoying in all the confidence of his fellow-citizens, and is now collector of the port of Wiscasset. The other of the four survivors of the lawyers of the last century, is *Ezekiel Whitman*, who graduated at Brown University in 1795, opened an office in Turner in 1799, and soon after in New Gloucester as successor of Samuel Thacher, and in 1806, removed to Portland. In the period of his active and busy life, he was seven years a representative from the Cumberland District in Congress; nineteen years on the bench of the Common Pleas and District Court, and seven years chief justice of the Supreme Court, and is now with the contemporaries of his early practice, Wilde, Rice, Thacher and Bailey, enjoying the comfort of a vigorous and serene old age, the well-deserved rewards of a life of honest, honorable, and useful labor. W.

NOTICE.

The undersigned has assumed, with the commencement of this volume, the control of the Monthly Law Reporter. There has been some delay in the publication of the present number, as the arrangements for the transfer were not completed until the latter part of April. Every reasonable effort will be made to make the Reporter worthy the patronage of a liberal, learned, and discerning profession. Judges, and Members of the Bar, are respectfully solicited to contribute to the Reporter such cases and matters of general interest to the profession as are within their reach. All communications on matters of business should be addressed to the publishers, Messrs. Little & Brown, 112 Washington Street — all other communications, to the undersigned.

GEO. P. SANGER,
4 Court Street.

Boston, May 7, 1851.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Abbott, Samuel B.	Lowell,	March 22,	Asa F. Lawrence.
Albro, Edward	W. Springfield,	" 7,	George B. Morris.
Bates, Joseph L.	Boston,	" 1,	John M. Williams.
Bates, Ralph G.	Holyoke,	" 8,	George B. Morris.
Batchelder, Curtis	Holliston,	" 4,	Asa F. Lawrence.
Bennett, Aaron B.	Holliston,	" 4,	Asa F. Lawrence.
Bigelow, Levi L.	Egremont,	" 24,	Thomas Robinson.
Bliss, Hiram C. H.	Boston,	" 24,	John M. Williams.
Brown, Charles H.	Malden,	" 14,	Asa F. Lawrence.
Brown, Curtis.	Waltham,	" 11,	Asa F. Lawrence.
Brown, Elijah	Bedford,	" 3,	Asa F. Lawrence.
Cleveland, Stephen W.	Boston,	" 21,	John M. Williams.
Cleveland, Anthony B.	Boston,	" 21,	John M. Williams.
Copeland, Charles R.	Amherst,	" 6,	Myron Lawrence.
Crocker, Hezekiah B.	Boston,	" 4,	John M. Williams.
Crowell, Benajah	Harwich,	" 19,	Zeno Scudder.
Davis, Wm. H.	Boston,	" 6,	John M. Williams.
Doolittle, John	New Bedford,	" 4,	D. W. Alvord.
Edwards, Eli	Conway,	" 12,	D. W. Alvord.
Ellery, Anna M.	Gloucester,	" 27,	John G. King.
Erskine, Jacob W.	Boston,	" 15,	John M. Williams.
Flagg, Silas Jr.	Holden,	" 29,	Henry Chapin.
Flanders, James	Amesbury,	" 20,	John G. King.
Foye, Timothy	Lowell,	" 3,	Asa F. Lawrence.
Gardner, George	Lowell,	" 19,	Asa F. Lawrence.
Hamilton, John M.	Palmer,	" 8,	George B. Morris.
Harris, Jonas C.	Ashland,	" 1,	Asa F. Lawrence.
Hitchcock, Nathaniel	Deerfield,	" 3,	D. W. Alvord.
Holden, Albert P.	Rochester,	" 4,	John M. Williams.
Holman, Joseph T. Jr.	Ipswich,	" 7,	John G. King.
Holmes, Timothy	Boston,	" 26,	John M. Williams.
Hooker, George	Bridgewater,	" 8,	Welcome Young.
Jackson, Jacob G.	Salem,	" 8,	John G. King.
Jones, George W.	Chicopee,	" 31,	George B. Morris.
Jordan, Alexander S.	Boston,	" 1,	John M. Williams.
Keith, Adna P.	Bridgewater,	" 25,	Welcome Young.
Lawton, Thomas	Lancaster,	" 29,	Henry Chapin.
Leftwich, Jas. F.	Boston,	" 4,	John M. Williams.
Leonard, Edwin S.	Greenfield,	" 11,	D. W. Alvord.
Locke, Lyman.	Kingston,	" 18,	John M. Williams.
Lyman, John W.	Boston,	" 21,	Welcome Young.
Martin, Betsey P.	Boston,	" 31,	John M. Williams.
Nichols, Heman	Holden,	" 17,	Henry Chapin.
Osborne, Albert W.	Springfield,	" 24,	George B. Morris.
Parker, George L.	Cambridge,	" 6,	Asa F Lawrence.
Parker, John C.	Millbury,	" 8,	Henry Chapin.
Parish, Milo M.	W. Stockbridge,	" 27,	Thomas Robinson.
Peabody, James M.	Lawrence,	" 25,	Asa F. Lawrence.
Perry, Emery	Worcester,	" 11,	Henry Chapin.
Plympton, Alden B.	Millbury,	" 4,	Henry Chapin.
Pynchon, Abner	Goshen,	" 1,	Myron Lawrence.
Ransom, Lewis A.	Westboro'	" 19,	Henry Chapin.
Redding, Samuel M.	Worcester,	" 15,	Henry Chapin.
Reeves, Benj. F.	Boston,	" 8,	John M. Williams.
Reynoldson, Hezekiah S.	Springfield,	" 4,	George B. Morris.
Shattuck, Munroe J.	Boston,	" 13,	John M. Williams.
Smith, Addison	Somerville,	" 6,	Asa F. Lawrence.
Stevens, Daniel J.	S. Reading,	" 27,	Asa F. Lawrence.
Thayer, Benj. E.	Templeton,	" 15,	Henry Chapin.
Thurston, Edward H.	Boston,	" 4,	John M. Williams.
Toombs, Wm.	Boylston,	" 24,	Henry Chapin.
Towne, Stephen T.	Dennis,	" 15,	John G. King.
Webster, George	Grafton,	" 7,	Henry Chapin.
Westcott, J. P. L. & Jos. H.	Newbury,	" 25,	John G King.
Westgate, Daniel	Wareham,	" 17,	Welcome Young.
Wetherell, Nathaniel L.	Raynham,	" 12,	David Perkins.
White, Wm. F.	Somerville,	" 5,	Asa F. Lawrence.
Whitney, Calvin	Westminster,	" 14,	Henry Chapin.
Wilder, John Jr.	Lowell,	" 19,	Asa F. Lawrence.
Wyatt, George W.	Somerville,	" 3,	Asa F. Lawrence.
Wyman, William	Lowell,	" 25,	Asa F. Lawrence.